(1)

No. 92-8894-CSH Title: Clarence Victor, Petitioner
Status: GRANTED v.
CAPITAL CASE Nebraska

Docketed: Court: Supreme Court of Nebraska
June 1, 1993

Vide: Counsel for petitioner: Weber,Markirk
92-9049 Counsel for respondent: Stenberg,Don, Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 1 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 4 1993	G	Application (A92-905) for stay of execution pending disposition of petition for certiorari, submitted to Justice Blackmun.
5	Jun 4 1993		Supplemental brief of petitioner filed.
4	Jun 8 1993		Application (A92-905) granted by Justice Blackmun.
6	Jun 23 1993		Brief of respondent Nebraska in opposition filed.
7	Jul 1 1993		DISTRIBUTED. September 27, 1993
9	Sep 28 1993		Petition GRANTED. limited to Question 3 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply. The cases are consolidated and a total of 90 minutes is allotted for oral argument.
			**********
10	Oct 25 1993		Record filed.
		*	Original proceedings District Court, Douglas County, Nebraska (BOX)
13	Oct 29 1993		Record filed.
		*	Certified record proceedings Supreme Court of Nebraska.
11	Nov 2 1993		Joint appendix filed.
12	Nov 9 1993		Brief of petitioner Clarence Victor filed.
14	Nov 17 1993	G	Motion of respondent California for divided argument filed.
15	Nov 22 1993		SET FOR ARGUMENT TUESDAY, JANUARY 18, 1994. (3RD CASE).
16	Nov 23 1993		CIRCULATED.
22	Dec 2 1993	G	Motion of petitioners for divided argument filed.
17	Dec 6 1993		Motion of respondent California for divided argument GRANTED.
18	Dec 6 1993	G	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
19	Dec 6 1993	X	Brief of respondent Nebraska filed.
20	Dec 6 1993	X	Brief amicus curiae of United States filed. VIDED.
23	Dec 6 1993	G	Motion of California District Attorneys' Association for leave to file a brief as amicus curiae filed.
24	Dec 13 1993		Motion of petitioners for divided argument GRANTED.
25	Dec 13 1993		Motion of Criminal Justice Legal Foundation for leave to

No. 92-8894-CSH

Entry	Date	Note	Proceedings and Orders
			file a brief as amicus curiae GRANTED.
26	Dec 13 1993		Motion of California District Attorneys' Association for leave to file a brief as amicus curiae GRANTED.
27	Dec 21 1993	X	Reply brief of petitioner Clarence Victor filed.
29	Jan 3 1994		Letter from counsel for the respondent received and distributed.
28	Jan 18 1994		ARGUED.

92-8894

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF NEBRASKA Plaintiff/Appellee v. CLARENCE VICTOR Defendant/Appellant	)	Case No. ORIGINAL **Motion to Appeal in Forma Pauperis**

COMES NOW the Defendant/Appellant, Clarence Victor, and pursuant to Rule 39 of the Federal Rules of Appellate Procedure, moves for leave to appeal in forma pauperis. A poverty affidavit of the Defendant is attached hereto as Exhibit "A" and incorporated herein by this reference.

Dated this 20 day of May, 1993.

x Clarence Victor
Clarence Victor, Defendant/Appellant
Nebraska State Penitentiary
Lincoln, Nebraska

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Certificate of Service

The undersigned certifies that a copy of the foregoing Motion to Proceed In Forma Pauperis was served by Certified Mail, Return Receipt Requested, on

Donald Stenberg
Attorney General
2115 State Capitol
Lincoln NE 68508

J. Kirk Brown
Assistant Attorney General
2115 State Capitol
Lincoln NE 68508

on the 28 day of May, 1993.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF NEBRASKA	)	Case No. _____
	)	
Plaintiff/Appellee	)	
	)	
v.	)	
	)	**Affidavit In Forma Pauperis**
CLARENCE VICTOR	)	**(Exhibit "A")**
	)	
Defendant/Appellant	)	

State of Nebraska)
) ss.
County of Lancaster)

I, Clarence Victor, being first duly sworn, depose and say that I am

and in support of my Motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, but I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

1. The trial court erred in failing to grant petitioner an evidentiary hearing as required by law concerning petitioner's petition for post conviction relief.

2. Counsel for defendant failed to provide effective assistance of counsel in several areas, both at trial and on appeal, each of which constituted ineffective assistance of counsel on its own.

3. The Nebraska Supreme Court erred in failing to reverse the trial court in refusing to retroactively apply Cage v. Louisiana.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. **Are you presently employed?**

   No.

   a. **If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.**

      Not applicable.

   b. **If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you receive.**

      1987. I MADE $150.00 PER WEEK AS A GENERAL LABORER.

2. Have you received within the past twelve months any income from a business, profession or other form of self employment, or in the form of rent payments, interest, dividends or other source?

   No.

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

      Not applicable.

3. Do you own any cash or checking or savings accounts?

   No.

   a. If the answer is yes, state the total value of the items owned.

   Not applicable.

4. Do you own any real estate, stock, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

   a. If the answer is yes, describe the property and state its approximate value.

      Not applicable.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No one is dependent upon me for support.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties of perjury.

Clarence Victor

Subscribed and sworn to before me this 20 day of May, 1993.

Notary Public

GENERAL NOTARY-State of Nebraska
MARK A. WEBER
My Comm. Exp. Febr. 10, 1996

Let the Appellant proceed without prepayment of costs or fees or the necessity of giving security therefore.

By the Court

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Finally, this Court can readily see that the Nebraska Supreme Court failed to apply the proper standard of retroactivity with respect to this Court's decision in Cage v. Louisiana, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). The Nebraska Supreme Court attempted once again to skirt the issue by indicating that they had resolved the Cage problem by virtue of their decision in State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991). With all due respect to the Supreme Court of the State of Nebraska, not only was their rationale incorrect, but an attempt by that Court to pass muster upon a United States Constitutional issue interpreted by the Supreme Court of the United States should have absolutely no precedental value within the State of Nebraska.

WHEREFORE, in view of the fact that the decision of the Supreme Court of the State of Nebraska deprived the Petitioner of Constitutional guarantees of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Petitioner respectfully requests this Court issue a Writ of Certiorari.

CLARENCE VICTOR, Petitioner

By

Mark A. Weber (#18666)
J. Joseph McQuillan (#12775)
WALENTINE, O'TOOLE,
McQUILLAN & GORDON
11301 Davenport Street
Omaha NE 68154
(402) 330-6300

Court Appointed Counsel for Petitioner

No. 92-8804

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

- - - - - - - - - - - 0 - - - - - - - - - - -

CLARENCE VICTOR,

PETITIONER,

vs.

STATE OF NEBRASKA,

RESPONDENT.

- - - - - - - - - - - 0 - - - - - - - - - - -

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEBRASKA

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MARK A. WEBER
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Attorneys for Petitioner

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT AN INDIGENT, ILLITERATE PETITIONER AN ATTORNEY TO PROPERLY RAISE ISSUES AND AN EVIDENTIARY HEARING AS REQUIRED BY LAW CONCERNING PETITIONER'S PETITION FOR POST CONVICTION RELIEF, CONTRARY TO THE UNITED STATES CONSTITUTION AND FEDERAL LAW.

II. WHETHER COUNSEL FOR DEFENDANT FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL IN SEVERAL AREAS, BOTH AT TRIAL AND ON APPEAL, EACH OF WHICH CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL ON ITS OWN.

III. WHETHER THE NEBRASKA SUPREME COURT ERRED IN FAILING TO REVERSE THE TRIAL COURT'S REFUSAL TO RETROACTIVELY APPLY CAGE v. LOUISIANA.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

CLARENCE VICTOR,

PETITIONER,

vs.

STATE OF NEBRASKA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEBRASKA

The Petitioner prays that the Writ of Certiorari be issued to review the judgment of the Supreme Court of Nebraska, entered January 29, 1993, and on which rehearing was denied March 10, 1993.

The opinion of the Supreme Court of Nebraska, No. S-91-933, dated January 29, 1993, is attached as Appendix A.

The letter of the Clerk of the Nebraska Supreme Court and Nebraska Court of Appeals, dated March 10, 1993, overruling Petitioner's Motion for Rehearing is attached as Appendix B.

The Order of the District Court of Douglas County, Nebraska, dated September 17, 1991, is attached as Appendix C.

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The jurisdiction of the Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America.

2. This case involves the following provisions of State Law:

Nebraska Revised Statutes, §29-2520
Nebraska Revised Statutes, §29-2521.03
Nebraska Revised Statutes, §29-2523
Nebraska Revised Statutes, §29-3001

Nebraska Constitution, Article I, Section 3
Nebraska Constitution, Article I, Section 9
Nebraska Constitution, Article I, Section 12
Nebraska Constitution, Article I, Section 13

The text of the Nebraska Statutes is set forth in Appendix D.

The text of Nebraska Constitution provisions of set forth in Appendix E.

The Nebraska Supreme Court Advisory Committee Opinion is set forth in Appendix F.

STATEMENT OF THE CASE

Victor was originally charged and convicted by a jury of Murder in the First Degree and use of a weapon to commit a felony. He is currently under a sentence of death for the offense of Murder in the First Degree and a consecutive sentence of 20 years imprisonment for the offense of Use of a Weapon to Commit a Felony. His conviction and sentence were the subject of a direct appeal to the Nebraska Supreme Court where said conviction and sentence was affirmed. State v. Victor, 235 Neb. 770, 457 N.W.2d 431 (1990). Subsequently, Defendant filed his Petition for Writ of Certiorari to the Supreme Court of the United States of America. Defendant's Petition was denied _____S.Ct. _____ (1991) (Supreme Court Case No. 90-6259)

The facts of the case are as follows:

At approximately 6:00 p.m. on Saturday, December 26, 1987, Omaha Police were dispatched to 2125 Ohio Street. Upon arrival, the police officers entered the residence and found the deceased, Alice Singleton, lying on the floor in the kitchen area. The deceased had lacerations to the neck among other injuries, and it was later determined that these lacerations were the major contributing factor to her death.

The police investigation revealed that an individual named Clarence Victor had previously done gardening work for the deceased. In checking his record, police determined that Victor had been convicted of two previous homicides.

In the canvas of the neighborhood, police learned from a neighbor that an older model cream-colored four-door automobile was parked west of Mrs. Singleton's residence at approximately 5:00 p.m. on December 26, 1987. A black male described only as between the ages of 30 and 40, wearing sunglasses and a hat, was observed seated behind the steering wheel of the car.

On December 29, 1987, Omaha Police Officer Timothy Conahan had located the residence of Mr. Victor and observed Victor's vehicle parked in the area.

Mr. Victor's vehicle is described as a larger, older model four-door vehicle, gold in color.

The neighbor who had observed the suspicious vehicle near the Decedent's house was retrieved by the police and given the opportunity to observe Mr. Victor's vehicle. The witness stated that Victor's vehicle was similar to the one she had seen, but could not positively identify it as being the same vehicle.

The police determined that Mr. Victor should be questioned, but he officers believed they did not have sufficient probable cause to obtain an arrest warrant for him at this point. Lieutenant Larry Roberts, commanding officer of the Omaha Police Division Homicide Unit, directed plainclothes officers Conahan and Pitmon Foxall to keep Victor's residence under surveillance. The officers were instructed not to attempt to enter the residence of the Defendant, but rather to wait for him to exit the residence and enter the vehicle. Once in his vehicle, officers were instructed to stop the vehicle and make contact with Mr. Victor.

After having kept the vehicle under surveillance for an hour and a quarter, a black male entered the vehicle and proceeded north on 25th Avenue. Both Officer Foxall and Officer Conahan, in separate unmarked vehicles, followed the suspect's vehicle. After traveling a few blocks, the officers made contact with a uniformed officer in a marked cruiser and directed that officer to stop the suspect's vehicle.

The cruiser officer obtained the license and registration from the driver of the vehicle and turned it over to Officer Foxall. The driver, now identified as Clarence Victor, was informed by Officer Foxall that an investigation was being conducted and that they would like Victor to accompany them to the police station. Mr. Victor complied and he was transported in Officer Foxall's unmarked cruiser car to the police station. Victor's vehicle remained in the parking lot where it had been stopped.

Victor was brought to the fourth floor of the Omaha Police Station and was questioned about his whereabouts on December 25 and 26, 1987, the date of the homicide. Victor was not advised of his Miranda rights nor was he informed in any fashion that he was or was not under arrest.

Victor was questioned by Officers Conahan and Foxall concerning the death of Mrs. Singleton and Victor gave them an exculpatory statement indicating that he had not been near the residence of the deceased on that date.

The police officers then requested that Victor execute a consent to search form for the search of his residence at 2344

Manderson Street in Omaha, Nebraska, and also for his automobile. Victor agreed to do so. Upon request of the police officers, Victor also agreed to provide hair samples and fingernail scrapings.

Victor was then transported by Officers Conahan and Foxall to his residence for purposes of conducting the search. Contemporaneously with the search of his residence, Victor's brother-in-law, Fred Walker, was interviewed by one of the police officers. Mr. Walker was specifically asked about Victor's whereabouts on December 26, 1987, and in the officer's opinion Walker's responses were inconsistent with those previously given by Victor.

After the residence search, Victor was returned by the police officers to the Central Police Headquarters. At that time, he was informed of the apparent inconsistencies in his story as compared with that of his brother-in-law. In addition, he was advised of his Miranda rights and asked to explain the inconsistencies. Victor answered yes to all questions on the rights advisory form and for a time continued to deny involvement in the homicide.

Officer Foxall then called Mr. Victor's attention to a previous homicide for which he had been convicted in 1964. Officer Foxall testified: "I specifically told Mr. Victor that when my father had investigated that homicide, he didn't lie to my father and that he didn't have to lie to me. And that's when Mr. Victor, at that point told me that he had been at the Singleton residence. He said that he had knocked on the door, she answered, there had

been some argument by Mrs. Singleton, "at which time he struck her."

Mr. Victor then agreed to give a taped statement concerning his involvement with the homicide of Mrs. Singleton. At the trial, his taped statement was marked as Exhibit 28 and received into evidence over Victor's objection.

In his taped statement, Victor acknowledged that he went to Mrs. Singleton's home on December 26, 1987, and knocked on the door. After opening the door, she began to scream and began to swing her hand and scratched the Defendant. The Defendant stated he struck her then with his hand and knocked her down and then struck her in the head with a pipe. He claimed that Mrs. Singleton, while on the ground, got tangled in some type of cord and he used his pocket knife to cut the cord loose from her throat. Victor indicated that he had left Mrs. Singleton's residence and returned home.

When asked by Officer Foxall why he killed Mrs. Singleton, the Defendant responded that he drank too much.

At trial, Dr. Blain Roffman, a pathologist, testified that he performed an autopsy on the body of Alice Singleton. He testified that he observed a contusion above the right eyebrow and on the right cheek area and some discoloration around the right orbital area. He also observed bruising on the left eye and a contusion and bruise to the left ear.

Dr. Roffman further testified that he observed five lacerations to the neck and throat area, three of which penetrated

deeply into the skin, including one which penetrated down to the level of the adams apple.

Mrs. Singleton also suffered fractures of the fourth through ninth ribs on the right side and second through ninth ribs on the left side.

Dr. Roffman opined that the head injuries were caused by blunt trauma. He would only estimate that the trauma was caused by several blows to the head. Finally, the cause of death was attributed to a laceration of a branch of the left carotid artery with subsequent hemorrhaging.

The jury returned a verdict of guilty of Murder in the First Degree.

Pursuant to Neb. Rev. Stat. §29-2520 (Reissue 1985), a sentencing hearing was held before a three judge panel on August 26, 1988. At the sentencing hearing, the Court received into evidence a complete transcript of the testimony adduced at trial and all items received into evidence at the trial. The sentencing panel also received into evidence Exhibits 29, 30, 31, 32 and 33. Exhibit 29 was a certified copy of the judgment and sentence in State v. Clarence Victor, Doc. 95, No. 308, in the District Court of Douglas County, Nebraska, showing Victor's conviction of Murder in the Second Degree in 1976. Exhibit 30 consisted of a certified copy of the record of State v. Clarence Victor, Doc. 70, No. 304, in the District Court of Douglas County, Nebraska, evidencing Defendant's conviction of the crime of manslaughter. Also a portion of Omaha Police Division report was included relating to

the Defendant's charge and conviction of manslaughter as evidenced by Exhibit 30. Exhibits 32 and 33 consisted of copies of records of the State Department of Correctional Services relating to the Defendant while he was incarcerated in the Nebraska Penal and Correctional Complex on previous occasions.

The Sentencing Panel sentenced the Defendant to death.

In support of their finding, they determined that the State had proven beyond a reasonable doubt that the Defendant was previously convicted of another murder or a crime involving the use or the threat of violence to the person or has a substantial history of serious assaultive or terrorizing criminal activity, which is aggravating circumstance (1)(a) §29-2523 Neb. Rev. Stat. To support the existence of aggravating circumstances (1)(a), the Court relied on the conviction for Second Degree Murder and the police reports in the 1964 manslaughter conviction.

The Court also found that Neb. Rev. Stat. §29-2523 (1)(d) also was proven by the State beyond a reasonable doubt. §29-2523 (1)(d) reads: "The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence." In making their finding they separated the section into two prongs. The Court specifically found that prong one, that is, that the murder was especially heinous, atrocious, cruel ". . . was proven beyond a reasonable doubt."

In support of this finding, the Court stated:

> The panel finds from the evidence beyond a reasonable doubt that the murder of Alice Singleton was especially heinous, atrocious, and cruel in that she was subjected to the imposition of extreme suffering by the Defendant

prior to her death, all as demonstrated by the nature of the injuries described above, the manner of their infliction, and her being alive and conscious during most if not all of the assault. Therefore,the panel finds that this prong of the aggravating circumstances exists beyond a reasonable doubt.

As to the second prong " . . . manifested exceptional depravity by ordinary standards of morality and intelligence . . . " of §29-2523 (1)(d) the Court found there was insufficient evidence to prove its existence beyond a reasonable doubt.

The Sentencing Panel found that none of the statutory mitigating circumstances as set out in Neb. Rev. Stat. §29-2523(2)(a-g), were present. However, the sentencing panel did find that the Defendant's exemplary prison record compiled on prior incarcerations was a mitigating circumstance.

Nonetheless, the Court found that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases.

Victor filed a Motion for Post-Conviction Relief with the Douglas County District Court pursuant to Neb. Rev. Stat. §29-3001 (et seq.) (Reissue 1989). Said Motion was filed on or about May 10, 1991.

Additionally, Victor requested leave to proceed In Forma Pauperis and for appointment of counsel concerning Appellant's Post-Conviction Relief Appeal.

Without hearing on the matter, the Court denied Defendant's Motion for Appointment of Counsel and that he be granted an evidentiary hearing and found further that the Post-Conviction Petition be overruled. It should be mentioned that at all times

during these proceedings, until the appointment of Court-Appointed Counsel in or about November of 1991, that Appellant was Pro Se.

Following the District Court's denial of Defendant's "Pro Se" Motion to vacate sentence under Neb. Rev. Stat. §29-3001, et seq. (Reissue 1989), The Nebraska Post-Conviction Act, Defendant timely perfected his appeal to the Nebraska Supreme Court. At that point Defendant was, for the first time, afforded Court-Appointed Counsel.

The issues tried in the Court below were as follows:

1. That Victor was denied due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 3 of the Nebraska Constitution in that the trial court improperly instructed the jury on the law with regard to the concept of "Reasonable Doubt."

2. That the reweighing process of aggravating and mitigating circumstances engaged in by the Nebraska Supreme court violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 3, 9 and 13 of the Constitution of the State of Nebraska.

3. The death penalty imposed upon Victor was done in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States and Article 1, Sections 3 and 12 of the Nebraska Constitution in that the sentencing panel relied upon aggravating circumstances (1)(d) of §29-2523 (Neb. Rev. Stat.) 1943, which Section is unconstitutionally vague and results in an arbitrary imposition of capital punishment.

4. That the sentencing panel and Nebraska Supreme Court refused to follow the United States Supreme Court's holding in Lockett v. Ohio, 438 U.S. 586 (1978), requiring consideration of all mitigating factors whether Statutory of otherwise. Thus by deciding that aggravating circumstances §29-2523 (2)(g) did not exist and totally refusing to consider the Defendant's inability to conform his conduct to law because of mental defect or intoxication, the Defendant's rights under the Eighth and Fourteenth Amendment to the United States Constitution were violated.

5. That the death penalty imposed upon the Defendant was in violation of Neb. Rev. Stat. §29-2521.03 in that neither the sentencing panel nor the Supreme Court followed the requirement of comparing the facts of the Defendant's case with other "criminal homicides" with the same or similar circumstances to determine the proportionality with the Defendant's sentence with the results of similar cases in violation of the Eighth and Fourteenth Amendments of the Constitution of the United States.

6. That the sentencing panel erred by admitting into evidence at the sentencing hearing Victor's confession to a 1964 homicide which resulted in a Manslaughter conviction. That absent this confession, there was no evidence of support considering the incident for purposes of §29-2523 (1)(a) Neb. Rev. Stat. That the confession did not conform to the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), in that the evidence was uncontroverted that the police did not apprise Victor of his Fifth and Sixth Amendments rights under the United States Constitution. That the use of this statement to prove an aggravating circumstance was erroneous and a violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 12 of the Constitution of the State of Nebraska.

7. That the Defendant's confession was obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution in that it was not voluntary, it was the product of an unlawful arrest and was obtained without a valid waiver of his so-called "Miranda Rights."

8. The trial and appellate counsel was ineffective in failing to raise or improperly raising each of the aforementioned issues in violation of the Defendant's Sixth Amendment right to effective assistance of counsel.

The trial court in its Order of September 17, 1991 (Appendix C) overruling Victor's Motion to Vacate Sentence and Conviction, first of all refused to retroactively apply Cage v. Louisiana, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed. 2d 339 (1990). The Court argued that "[t]he decision in Cage was rendered after Defendant's conviction and affirmance of such conviction on appeal to the Nebraska Supreme Court. Cage does not indicate if its effect is

retroactive. The Court determines that it should not be applied retroactively." (Citations omitted). The balance of Victor's constitutional arguments were summarily overruled. See Appendix C.

Further, with respect to ineffective assistance of counsel, the trial court determined as a matter of law, " . . . that each of the aforementioned contentions either were raised on appeal to the Nebraska Supreme Court or the contention arose after his [Victor's] trial and final judgment by the Nebraska Supreme Court. Defendant's claim that his contentions were improperly raised on appeal constitutes a conclusion unsupported by any allegations of specific facts in that regard." Finally, the Court concluded that " . . . having reviewed lower court's motion and the files and records of this case, the Court finds that no evidentiary hearing is required and that Defendant's Motion should be overruled." (Appendix C).

Counsel was thereafter appointed to represent Victor on appeal. He was forced to appeal without properly amending pleadings or creating a proper record. The Constitutional deficiencies noted above were raised, briefed and argued before the Nebraska Supreme Court. In its opinion dated January 29, 1993 (Appendix A), the Nebraska Supreme Court held in summary that "finding no merit in the Assignments of Error properly before this Court, we affirm the decision of the District Court in its entirety." The Nebraska Supreme Court held that an evidentiary hearing was unnecessary because the Court alleged that Victor

> " . . . failed to advance, either in the Motion before the District Court or in the present appeal to this

Court, allegations of specific facts to support these bare conclusions. Since the Defendant failed to make a factual showing to indicate he was entitled to relief, the District Court did not err in denying Defendant an evidentiary hearing on these previously litigated issues."

With respect to the issue of retroactivity concerning the United States Supreme Court's decision in Cage v. Louisiana, the Nebraska Supreme Court held that it had upheld the Constitutionality of the reasonable doubt language of the Nebraska Jury Instruction. It found the language distinguishable from that found unconstitutional by the United States Supreme Court in Cage, citing its own Nebraska Supreme Court decision in State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991).

Following the Supreme Court's affirmance of the District Court on January 29, 1993, Victor thereafter timely filed his Motion for Rehearing. On March 10, 1993, the Nebraska Supreme Court overruled Victor's Motion for Rehearing. Accordingly, Victor properly perfects his appeal to this Court.

REASONS FOR GRANTING WRIT

I.

THE TRIAL COURT ERRED IN FAILING TO GRANT AN INDIGENT, ILLITERATE PETITIONER AN ATTORNEY TO PROPERLY RAISE ISSUES AND AN EVIDENTIARY HEARING AS REQUIRED BY LAW CONCERNING PETITIONER'S PETITION FOR POST CONVICTION RELIEF CONTRARY TO THE UNITED STATES CONSTITUTION AND FEDERAL LAW.

The Nebraska Supreme Court failed to reconcile its prior decisions with the decisions of United States Supreme Court as well as those from the United States District Court for the District of Nebraska with respect to the appointment of counsel for Victor and allowing Victor an evidentiary hearing on his Post-Conviction Petition.

The Nebraska Post Conviction Act, §29-3001, et seq. (Reissue 1989) requires that an evidentiary hearing on a proper Motion containing factual allegations, which, if proven, constitute a violation or infringement of a Constitutional right. State v. Maleck, 219 Neb 680, 365 N.W.2d 475 (1985). In this case, both the Nebraska Supreme Court and the trial court summarily overruled Defendant's Motion for Post-Conviction Relief. The trial court held as follows on this issue:

> Defendant has filed a Motion to vacate sentence and conviction pursuant to §29-3001, R.R.S. 1943, the Nebraska Post Conviction Act. Having reviewed Defendant's Motion and the files and records of this case, the Court finds that no evidentiary hearing is required and that Defendant's Motion should be overruled."

Appendix C.

The Nebraska Supreme Court also summarily dismissed this issue holding that the Petitioner failed to establish a basis of relief.

Yet the Petitioner, sentenced to die, was not afforded counsel to properly raise and preserve issues on his behalf. It must be kept in mind that Petitioner is illiterate.

The Nebraska Supreme Court has held that a hearing is usually advisable to avoid protracted litigation and if the facts alleged, if true, would justify relief, or when a factual dispute arises as to whether a Constitutional right was denied, an evidentiary hearing must be granted. State v. Scholl, 227 Neb. 572, 419 N.W.2d 137 (1988).

With respect to Victor's assertion of ineffective assistance of counsel, the trial court held that: "Defendant's claim that his contentions were improperly raised on appeal constitutes a conclusion unsupported by any allegations of specific facts in that regard." The trial court's refusal to appoint Victor counsel. The Nebraska Supreme Court in Scholl held that if the record is silent respecting allegations of ineffective assistance of counsel, the District Court is bound to hear Petitioner's evidence. State v. Scholl, 227 Neb. at 576.

As argued on appeal to the Nebraska Supreme Court, the case most directly on point involving an identical issue is the case of Smith v. Dahm, 779 F.Supp. 1045 (D. Neb. 1991). In that case, the Defendant, Keith E. Smith, had filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Nebraska. He intended to appeal, among other things, the District Court's denial of his Motion for appointment of counsel and for an evidentiary hearing concerning Smith's initial post-conviction

appeal. At the District Court level, the Court had refused to appoint Mr. Smith counsel. On direct appeal and following subsequent extensions of brief dates with the Supreme Court, Mr. Smith's appeal was dismissed. Thereafter, Smith filed a Post Conviction action and was again denied appointment of counsel. It should be noted that Smith had made several requests of the Nebraska Supreme Court to appoint counsel, but the Supreme Court denied his requests and deferred the appointment issue to the "appropriate" District Court.

On his Federal appeal, Judge Urbom, from the United States District Court of the District of Nebraska, noted as follows, citing Douglas v. California, 372 U.S. 353 (1963):

> Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

779. F.Supp. at 1046. (Emphasis supplied in original).

In the present case, Victor's one and only appeal concerning his allegation of ineffective assistance of counsel arose under the Nebraska Post-Conviction Act. Victor properly raised ineffective assistance of counsel with his Motion to vacate sentence before District Judge Buckley and additionally requested appointment of counsel and an evidentiary hearing to discuss this and other issues. As noted by Judge Urbom in Smith v. Dahm, Victor should have been afforded an opportunity to inquire into this issue since it was his first opportunity to do so.

The errors of the trial court and of the Nebraska Supreme Court on appeal were compounded by the fact that they ignored

Victor's illiteracy. Victor should have been afforded an opportunity to have Court appointed counsel represent him immediately for purposes of his post-conviction appeal in order to examine the lengthy record, discern appropriate issues, draft the Motion for Post-Conviction Relief and raise appropriate issues attacking his trial and appellate counsel effectiveness in order to properly present issues to the District Court and the Nebraska Supreme Court on appeal. Additionally, Victor was not afforded the opportunity to even argue the Motions he did raise at an evidentiary hearing. These denials and omissions only enhance and underscore the prejudice suffered by Victor in this case.

Perhaps the Supreme Court would determine that the failures as outlined immediately above were somehow due to procedural defects attributable to Appellant. Nevertheless, reference is again made to Smith v. Dahm, 779 F.Supp. 1048 (D. Neb. 1991). In Smith, Judge Urbom noted that United States Magistrate Judge Peister properly recognized the standard when alleged procedural defaults occur.

> In order to excuse these procedural defaults and have this Court consider his claims, Petitioner has the burden of demonstrating "cause" for and "prejudice" from his procedural defaults. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d 594 (1977). However, in Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), the Supreme Court held:
>
> > However, as we also noted in Engle, "[I]n appropriate cases" the principles of comity and finality that inform the concepts of cause and prejudice "must yield to the imperative of correcting a fundamentally unjust incarceration." 456 U.S. at 135 [102 S.Ct. at 1576]. We remain confident that, for the most part, "Victims of a fundamental miscarriage of justice will meet the cause and prejudice

> > standard." Ibid. But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a Constitutional violation has probably occurred in the conviction of one who is actually innocent, a Federal Habeas Court may grant the writ even in the absence of a showing of cause for the procedural default.
>
> 477 U.S. 495-96, 106 S.Ct. at 2649. The Court went on to explain that the effective assistance of counsel serves as a major safe guard against miscarriages of justice. Allowing the failure of effective assistance of counsel to be "cause" (if properly exhausted) would, in the eyes of the majority, remedy the manifest injustice feared by Justices Stevens and Blackmun, concurring. Id. at 496, 106 S.Ct. at 2649.

Smith v. Dahm, 779 F.Supp. at 1048-49.

Magistrate Peister went on to note in his Memorandum and Order recommending that Judge Urbom grant Habeas relief to Smith that no showing was made that the Petitioner exercised a voluntary, intelligent waiver of his right to counsel and elected to proceed pro se on appeal. Id. at 1049. See Faretta v. California, 422 U.S. 806 (1975); Johnson v. Zerbst, 304 U.S. 458 (1988). Magistrate Peister concluded that Petitioner's lack of counsel on direct appeal violated his due process rights under Douglas v. California, and recommended that the direct appeal should be reinstated so that Petitioner, with appointed counsel, would be able to assert all of the arguments that could have been raised on direct appeal but were not. Id. at 1050.

While the present case does not specifically address the issue analyzed in Smith v. Dahm, Supra, the case is analogous. Indeed, Magistrate Peister was faced with the precise issue of whether his Findings and Recommendations in Smith v. Dahm, would be applicable

in a Post-Conviction setting. Reference is now made to Turner v. Dahm, a matter that was pending in the United States District Court for the District of Nebraska at the time of Victor's Nebraska Supreme Court Appeal. The case was unreported but is Case No. CV 90-L-381. A copy of the Memorandum and Order in Turner v. Dahm is attached hereto as Appendix G.

It should be noted that the precise issue addressed by Victor here concerning appointment of counsel was not appealed by the State of Nebraska in that case.

Counsel submits that the facts in Turner are substantially identical to the facts of the present case. In Turner Petitioner filed a Pro Se Post Conviction Action in the District Court and requested appointment of counsel. On the same day, the District Court denied Petitioner's Motion without hearing and denied the Request for Appointment of Counsel. The denial of Post-Conviction Relief was not appealed to the Nebraska Supreme Court. Thereafter, Petitioner filed his Petition for Habeas Corpus in the United States District Court for the District of Nebraska. In his Habeas Petition, Petitioner raised (inter alia) a Fourth Amendment Due Process claim, alleging that he was denied a fair trial and also ineffective assistance of counsel in various particulars.

Judge Peister went on to perform an extensive analysis of the right to counsel issue in post conviction proceedings.

> I must first determine whether Petitioner has shown sufficient "cause" for his failure to raise these claims [ineffective assistance of counsel]. Petitioner alleges that following his filing of the Motion for Post Conviction Relief, he requested that the State District Court appoint counsel to assist him in the presentation

> of his proceedings. That request for counsel was denied and the Motion for Post Conviction Relief was denied without an evidentiary hearing. The denial of that assistance of counsel in Petitioner's First Post Conviction action was alleged as "cause" for his default and the claims raised herein.
>
> It is generally held that there is no Constitutional right to an attorney in State Post-Conviction actions. Murray v. Giarratano, 492 U.S. 1 (1989); Pennsylvania v. Finley, 481 U.S. 551 (1987). However, one possible exception to the above stated rule can be found in cases where "ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in State Habeas" Coleman v. Thompson, ___ U.S. _____, ____ 59 U.S.L.W. 4789, 4798 (June, 1991), or as are the circumstances here, only in a post-conviction action. As noted by the Court in Coleman, under those circumstances "State collateral review is the first place a prisoner can present [such] a challenge to his conviction." Id. (Emphasis added).
>
> The exception to the rule of Finley and Giarratano arises out of the long established Due Process requirement that an indigent defendant has the right to an attorney on his first appeal as of right. As stated in Coleman:
>
> > Douglas v. California, 372 U.S. 353 (1963), established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in State Court. Evitts v. Lucey, 469 U.S. 387 (1985), held that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. We based our holding in Douglas on that "Equality demanded by the Fourteenth Amendment." 372 U.S. at 358. Recognizing that "[A]bsolute equality is not required" we nonetheless held that "where the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." Id. at 357 (Emphasis in original).
>
> 59 U.S.L.W. at 4798 (Emphasis in original).
>
> In this case, Petitioner's "one and only appeal," or its equivalent, in which to raise his ineffective assistance of trial and appellate counsel claims (because those claims could not have been raised on direct appeal) was

> a State Post-Conviction Action. Despite his request for counsel in State District Court, that "one and only appeal" was disposed of without the assistance of counsel and without hearing.

Id. at 3-4.

After citing Bounds v. Smith, 430 U.S. 817 (1977), and Douglas v. California, Supra, Magistrate Peister noted that "[I]mplicit in the holdings of those cases is the proposition that an inmate is denied a meaningful "one and only appeal" if he is denied the assistance of counsel in determining what issues he may properly raise, and for Federal Habeas purposes, which issues he must raise, in that first post conviction proceeding. This is precisely the problem in the present case which the Nebraska Supreme Court failed to recognize.

Magistrate Peister went on to recognize the Murray v. Carrier standard, 477 U.S. 478 (1986) standard as noted in the previously cited case of Smith v. Dahm:

> We explained clearly [in Carrier] that "cause" under the cause and prejudice standard test must be something external to the Petitioner, something that cannot fairly be attributed to him:
>
> > "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the Petitioner can show that some objective factor external to the defense impeded counsel's [(or in this case Petitioner's)] efforts to comply with the State Procedural Rule." 477 U.S. at 488.
>
> 59 U.S.L.W. at 4797 (Emphasis in original). In this case the "external" impediment preventing Petitioner from raising his ineffective assistance at trial and/or appellate counsel claims was the District Court's refusal to provide him with counsel in the first State Court proceeding in which those claims could be raised. I conclude, therefore, that under the circumstances the State District Court's denial of Petitioner's right to

> counsel in his first post conviction action is adequate "cause" for his procedural default.

Turner v. Dahm, (CV 90-L-381) Exhibit "G" at Page 5.

Judge Peister found that the further burden is on the Petitioner to show that the default on his ineffective assistance claims resulted in prejudice. Judge Peister noted that the question required analysis of the merits of his ineffective assistance claims, an analysis which could not be undertaken with the record as it stood because the State District Court denied the Petitioner's request for an evidentiary hearing.

Judge Peister concluded that if the Petitioner requested an evidentiary hearing, the District Court must grant it if:

1) The merits of the factual dispute were not resolved in the State hearing;

2) The State factual determination is not fairly supported by the record as a whole;

3) The fact finding procedure employed by the State Court was not adequate to afford a full and fair hearing;

4) There is a substantial allegation of newly discovered evidence;

5) The material facts were not adequately developed at the State Court hearing; or

6) For any reason it appears that the State trier of fact did not afford the Habeas Applicant a full and fair fact hearing.

Turner v. Dahm, CV 90-L-381 at Page 5; citing Warden v. Wyrick, 770 F.2d. 112 (8th Cir. 1985); Townsend v. Sain, 372 U.S. 293 (1963).

Magistrate Peister concluded in Turner that the State District Court did not employ a fact-finding procedure and, therefore, did not resolve any factual issues concerning Petitioner's present

ineffective assistance of counsel claims and accordingly awarded an evidentiary hearing to the Petitioner. Id. (Appendix G).

In this case, the Petitioner, who could barely read or write, was forced to draft a Motion to vacate sentence and conviction under the Nebraska Post Conviction Act raising the issue of ineffective assistance of counsel. Evidence would show that the ineffective assistance of counsel claim raised, together with the other issues, were drafted by the very attorney who represented Defendant at trial and appeal. This created an irreconcilable conflict of interest (See Argument II), Infra. Interestingly, however, the Nebraska Supreme Court refused to address this issue because it claimed the record was incomplete, but at the same time concluding no evidentiary hearing was necessary.

Counsel should have been appointed by the District Court immediately after Victor's direct appeal to provide Victor with new counsel who would then have the opportunity to review and revise Victor's claims for post conviction appeal, especially the claim of ineffective assistance of counsel. Thereafter, Victor should have been granted an evidentiary hearing to properly analyze the issues raised.

With respect to the Turner v. Dahm decision, it is Petitioner's contention that the "one and only appeal" afforded Petitioner as to his ineffective assistance of counsel claims was the Nebraska State Post Conviction action. Furthermore, by denying Petitioner's Request for appointment of counsel, Petitioner's "one and only appeal" was discarded without the assistance of counsel

and without any hearing on the matter. Turner v. Dahm, although involving a Habeas Corpus action, is identical to the problems presented in this case. In citing Douglas v. California, 374 U.S. 353 (1963), and Bounds v. Smith, 430 U.S. 817 (1977), Judge Piester stated:

> Implicit in the holdings of these cases is the proposition that an inmate is denied a meaningful "One and only appeal" if he is denied the assistance of counsel in determining what issues he may properly raise and for Federal Habeas issues, which issues he must raise, in the first post conviction proceeding.

Turner v. Dahm, CV 90-L-381 (1991).

Judge Piester went on to find that by denying court appointed assistance of counsel to properly and adequately raise ineffective assistance of counsel claims, the Petitioner had demonstrated sufficient cause to grant an evidentiary hearing. More importantly Piester noted that he could not determine whether the ineffective assistance claims resulted in any prejudice because the evidentiary hearing was summarily denied by the State Court and therefore an evidentiary hearing had to be held to determine if any prejudice did exist. This is precisely what should happen in this case.

In its opinion the Nebraska Supreme Court refused to address the most significant issue presented on appeal, i.e., the fact that Petitioner was not afforded counsel to properly formulate, raise and preserve legitimate post conviction issues on Petitioner's behalf. Counsel for Petitioner is curious as to why the Nebraska Supreme Court saw fit to afford Petitioner counsel at all in this case when counsel was required to proceed on appeal with the issues raised by Petitioner and the fact that the trial court summarily

overruled Petitioner's Motion to Vacate Sentence without opportunity for an evidentiary hearing.

Under the Nebraska Supreme Court rationale, that Court would deny an indigent and illiterate Defendant court-appointed counsel to commence a proper Post Conviction Action at all. The Nebraska Supreme Court decision in this case effectively blindfolded Petitioner, required him to proceed unaided when he would have had no abilities to either read or write and then by virtue of its opinion criticizes Petitioner because he could not see the pitfalls waiting for him with respect to procedural defects in his Motion for Post Conviction Relief. The failure of the Petitioner in this case to have the ability to articulate, not to mention conceive of the appropriate issues to appeal on Post Conviction, could later be construed to be a procedural bar in a subsequent Federal Habeas Corpus action. This certainly was not the spirit of the Nebraska Post Conviction action and certainly runs afoul of Federal decisions on this particular issue.

To even further magnify the failure of the Nebraska Supreme Court to square its rationale on this issue, counsel will undertake a comparison of that Court's interpretation of Defendant's rights under a State Post Conviction Action versus the rights afforded a Petitioner in a Federal Habeas Corpus Action.

Rule 8 (c) of the rules governing Section 2254 cases [Federal Habeas Corpus] notes that "[T]hese rules do not limit the appointment of counsel under 18 U.S.C. §3006 A at any stage of the case as the interests of justice so requires." Legislative history

behind the above rule notes that Habeas Corpus and similar proceedings often present "serious and complex issues of law and fact" of a sort requiring assistance of counsel. H.R. Rep. #1546, 91st Congress, Sec. Sess. (1970). J. Liebman, Federal Habeas Corpus Practice & Procedure, Vol. 1 at Page 170.

Further, the Legislative history has determined that Federal Courts should make counsel available from the beginning of Habeas Corpus proceedings if the Petition raises a substantial legal issue. Further, the Congressional Report on the provision concerning appointment of counsel states that the Court "should" appoint counsel when "necessary to insure a fair hearing." Id.

Liebman in his analysis of the right to appointment of counsel in Federal cases notes that:

> In conformity with these expressions of Congressional intent, the Courts generally have endorsed the appointment of counsel to represent indigent and legally unsophisticated prisoners in:
>
> 1. Capital cases, given the especially wide range of difficult legal questions raised by Furman v. Georgia and Gregg v. Georgia; The complex bifurcated nature of capitol trials which make special demands on counsel not present in other cases; and the especially stringent requirements of procedural due process and reliability that the Eighth Amendment places on procedures leading to death sentences.
>
> 2. Cases that turn on substantial and complex legal or mixed legal and factual questions (Eg., the fair composition of grand and petit juries, the voluntariness of confessions, and the effective assistance of counsel).
>
> 3. Cases involving mentally or physically impaired Petitioners;
>
> 4. Cases likely to require the assistance of experts, either in framing or in trying the claims.

5. Cases in which "the indigent is in no position to investigate crucial facts" and

6. Cases in which the evidence to be presented is likely to consist of "conflicting testimony" and the truth is more likely to "be exposed where both sides are represented by those trained in the presentation of evidence nd in cross-examination."

Some Courts apply even more liberal appointment of counsel rules assigning attorneys:

7. Cases in which the Petitioner "has a colorable claim, but lacks the capacity to present it" or in which the legal issues are difficult and the Petitioner has not "demonstrated a workable knowledge of the legal process."

8. Cases involving at least one strong legal claim.

9. Analogous cases.

Id. at 170-73 (Citations omitted.) (Emphasis added.)

Counsel for Petitioner will submit that each of the above nine examples of why counsel should be appointed exist in the present case.

The failure of the Nebraska Supreme Court to correct the trial court errors in failing to appoint Petitioner counsel in this case and further to allow Petitioner an evidentiary hearing in which to present a factual basis cannot now be cured absent this Court granting a Writ of Certiorari to the Supreme Court of the State of Nebraska and require that Court to recognize this Court's noted exception to the rule denying counsel in State Post Conviction actions. See, Douglas v. California, 372 U.S. 353 (1963) and its progeny. See also, Coleman v. Thompson, ___ U.S. ___, 59 U S L W 4789, 4798 (June, 1991).

II.

COUNSEL FOR DEFENDANT FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL IN SEVERAL AREAS, BOTH AT TRIAL AND ON APPEAL, EACH OF WHICH CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL ON ITS OWN.

The Nebraska Supreme Court has held that in order to establish a right to post conviction relief based upon a claim of ineffective assistance of counsel, a criminal defendant must prove that his counsel failed to perform as well as a lawyer with ordinary training and skills in the criminal law area, or that he failed to conscientiously protect the client's interests. Petitioner maintains in this case that his counsel at the trial and appellate level, Mr. Thomas Riley, failed to protect his client's interests and failed to perform as well as a lawyer with ordinary training and skill in the criminal law area.

Petitioner maintains that based upon the record, he suffered prejudice in the defense of his case and as a result of counsel's actions and inactions during the proceedings at the trial level, a reversal of this case for a new trial would be warranted as outlined by the prior decisions of this Court. See State v. Broomhall, 227 Neb. 341, 417 N.W.2d 349 (1988); State v. Isikoff, 233 Neb 679, 292 N.W.2d 983 (1986); State v. Hockstein, 216 Neb. 515, 344 N.W.2d 468, Cert. Denied, 469 U.S. 873 (1984).

Concerning the burden to show prejudice, it is well known that the convicted Defendant seeking a reversal of his conviction or sentence for reason that counsel's assistance was deficient, must show a reasonable probability that but for counsel's unprofessional

errors, the results of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Reddick, 230 Neb. 218, 430 N.W.2d 542 (1988); State v. Peary, 223 Neb. 556, 391 N.W.2d 566 (1986); State v. Robinson, 218 Neb. 156, 356 N.W.2d 879 (1984); and State v. Stranghoener, 212 Neb. 203, 322 N.W.2d 407 (1982). Such a burden can be met in this case upon review of the record.

In the case of Strickland v. Washington, 104 S.Ct. 2050 (1984), the United States Supreme Court set out the standard by which effectiveness of counsel should be judged. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of the conviction or death sentence has two components. First, the defendant must show counsel's performance was deficient. This requires showing that the counsel made errors so serious that the counsel was not functioning as the "counsel" guaranteed the Defendant by the Sixth Amendment. Second, the Defendant must show that the deficient performance prejudiced the defense. This requires showing that the counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable.

Indeed, it should be noted that the test formulated by Strickland is not had the Defendant litigated the particular motion would the result of the motion have been a success or failure. Neither is the question, according to Strickland whether the Defendant is innocent or guilty.

Additionally, since the trial court refused to grant an evidentiary hearing or appoint counsel to reformulate appropriate issues on Post-Conviction, Counsel is forced to submit that the record would support a finding of ineffectiveness.

Nevertheless, present counsel did point to some evidence in the record to support the contention that trial and appellate counsel assisted Petitioner in formulating his Motion for Post-Conviction relief. This, in and of itself, constituted an irreconcilable conflict of interest. More importantly, it constituted ineffective assistance of counsel because the acts of counsel effectively destroyed Petitioner's Post Conviction Appeal. The trial court's summary denial of Petitioner's Motion and his request for counsel speaks for itself. So does this Court's holding in Porter:

> The Constitution assures the Defendant effective representation by counsel whether the attorney is one of his choosing or court appointed. Such representation is lacking, if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents--as a vigorous advocate having the single aim of acquittal by all means fair and honorable--are hobbled or fettered or restrained by commitments to others. [Citations omitted.]
>
> Of course, such things as this should never happen, and the place to stop it is the professional conscience of the advocate involved. The Court may not countenance it and must, on the contrary, take effective action just as we are certain the careful judge below would have done had the facts been known and/or before the commencement of the criminal trial. But where this has been allowed to occur, either through a callous conscience of the attorney, or ignorance of the true facts by the judge, the trial is not the fair one demanded by the Constitution. And this is true without regard to the presence or absence of any action of a strictly governmental nature which can be ascribed to the prosecution as the transgressing agency or imputed to the

> trial court on traditional notions of error on the Judge's part.

Porter v. United States, 289 F.2d. 461, 463-64 (5th Cir. 1962).

Initially, as noted above, it is defense counsel's job to recognize the existence of a potential conflict of interest, for counsel to alert his client and the Court as to the potential conflict, and to obtain the client's informed consent to counsel's continued representation despite the risks. Once alerted to the potential conflict, or made aware of facts from which is appears that conflicting interests arguably exist, the trial court must conduct an inquiry of the Defendant as to whether the Defendant is aware of the potential risks and knowingly has chosen his counsel's continued representation despite those risks. People v. McDonald, 68 N.Y.2d 1, 505 N.Y.S. 2d 824, 496 N.E.2d 844 (Ct. App. 1986).

In the case before the Court, it is apparent from the records that Tom Riley, counsel for the Petitioner at trial level and direct appeal, was additionally counting on representing Petitioner for his Nebraska Post Conviction Relief Act. It requires mention that despite a question in the record as to the origins of Petitioner's Motion to Vacate Sentence and Conviction under Neb. Rev. Stat. §29-3001, one can readily note that the Defendant's Motion was notarized by Mr. Timothy Burns, Assistant Public Defender.

Because of the unique nature of the governmental protections afforded Defendants under the Nebraska Post-Conviction Act, this was Petitioner's one and only opportunity to attack trial counsel's effectiveness. That this Motion was drafted by the same trial and

appellate counsel merely begs the question of conflict of interest. Again, since there was no evidentiary hearing on this issue, we are not now able to determine whether the Motion was drafted on behalf of the Petitioner after first fully advising him of a potential for conflict, and the effects that a potential conflict could have on the merits of his appeal or subsequent appeals.

Reference is now made to the Nebraska Supreme Court Advisory Committee Opinion No. 90-1. (Attached as Appendix F for the Court's convenience). The Advisory Committee Opinion was requested by Thomas J. Garvey, Sarpy County Public Defender, then counsel on behalf of John Joubert concerning that Defendant's First Degree Murder conviction. Garvey had requested an opinion of the Advisory Committee concerning his ability to serve as Joubert's counsel on appeal when other members of the Public Defender's Office had represented Joubert at trial. Garvey joined the Public Defender's Office shortly after Joubert's direct appeal to the United States Supreme Court and requested the Advisory Opinion prior to representing Joubert on his Post Conviction Appeal. After reviewing these and other facts substantially similar to the case at bar, the Advisory Committee concluded as follows:

> Under the facts presented, a County Public Defender should not represent a Defendant convicted of First Degree Murder and sentenced to death seeking to overturn the conviction and sentence in a Federal Habeas Corpus action where the grounds for relief involve alleged ineffective assistance of another lawyer in the Public Defender's office . . . .

The record in this case does not reflect whether or not the Petitioner was even informed of the potential conflict of interest

with respect to Trial and Appellate counsel's representation of Petitioner concerning his Motion for Post Conviction Relief. Even so, it is apparent that under the circumstances of this case, it was clearly erroneous for trial counsel to continue to represent the Petitioner on Post-Conviction, despite the fact that counsel undoubtedly had Petitioner's best interests in mind.

A Writ of Certiorari should be issued to the Nebraska Supreme Court with directions that new counsel be afforded the Petitioner to properly raise issues on behalf of the Petitioner which were not raised and preserved prior to this time.

III.

THE NEBRASKA SUPREME COURT ERRED IN FAILING TO REVERSE THE TRIAL COURT'S REFUSAL TO RETROACTIVELY APPLY Cage v. LOUISIANA.

The District Court in its Order overruling Appellant's Motion to Vacate Sentence and Conviction limited its discussion to whether Cage v. Louisiana, 498 U.S. ___, 111 St. Ct. 328, 112 L.Ed. 2d 339 (1990), should be retroactively applied. However, retroactivity of Cage is a moot point under State v. Reeves, 244 Neb. 711, 453 N.W.2d 359 (1990). Retroactivity does not become an issue until a conviction has become final and "A conviction is final where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for Petition for Certiorari has lapsed." State v. Reeves, Supra, at 383, Citing Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986). Therefore, for purposes of retroactivity and finality, Appellant's conviction was not final until the United States Supreme Court denied Certiorari in February of 1991, at least two months after the Cage decision. Thus, it was error for the District Court to hold that the rule in Cage should not be applied to Appellant's case.

The State of Nebraska argued that the Nebraska Supreme Court's decision in State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), disposes of any Constitutional infirmity with respect to the reasonable doubt instruction given at Petitioner's trial. While that Court had attempted to artfully distinguish the Reasonable Doubt Instruction given in Cage with that of the Reasonable Doubt Instruction given in Morley, (The Morley Reasonable Doubt

Instruction is identical to the one given at Victor's trial), Petitioner respectfully contends that the Reasonable Doubt Instruction given at his trial not only confused the jury, but suggested a higher degree of doubt than is required under the Fourteenth Amendment.

In considering jury instructions, an Appellate Court is obligated to consider how reasonable jurors could have understood the charge as a whole. Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 328, 112 L.Ed.2d 339 (1990). When using the terms "Reasonable Doubt" and "Substantial Doubt" as equivalents, this in and of itself is confusing and contradictory. In U.S. v. Atkins, 487 F.2d 257 (8th Cir. 1973), the Eighth Circuit Court of Appeals struck down a jury instruction that equated Reasonable Doubt with Substantial Doubt. The Court in Atkins stated that "Proof beyond a reasonable doubt would seem to require a greater evidentiary showing by the Government than proof of guilt beyond a substantial doubt." Id. at 260 (Emphasis added.)

Other courts have criticized an instruction which equates reasonable doubt with substantial doubt. See, e.g., Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); Smith v. Borden Kircher, 718 F.2d 1273 (4th Cir. 1983); See also, U.S. v. Wright, 542 F.2d 975, 988 (7th Cir. 1976) (Courts including substantial doubt language in its reasonable doubt instruction "can reasonably expect a reversal"), Cert. Denied, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed 790 (1977); U.S. v. Alvero, 470 F.2d 981, 983 (5th Cir. 1972) (Reversal of

conviction based upon Reasonable Doubt Instruction defined as a "Very Substantial Doubt.")

While the use of "Substantial Doubt" language to define Reasonable Doubt in a jury instruction is not in itself reversible error, See, Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978),

> . . . a jury instruction that utilizes substantial doubt language can and will require reversal unless it can be concluded beyond a reasonable doubt that the jury was not misled by the instruction.

Monk v. Zelez, 901 F.2d 885, 890 (10th Cir. 1990); citing Chapman v. California, 386 U.S. 18, 29, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); Holland v. U.S., 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed.150 (1954).

A determination as to whether the jury was misled by the Reasonable Doubt Instruction must be undertaken. As this case involved a First Degree Murder Conviction, it is Petitioner's contention that had a proper Reasonable Doubt Instruction been given (or no instruction at all which attempted to define Reasonable Doubt), there is a reasonable likelihood that the jury could have had a reasonable doubt as to the Appellant's mental state at the time of the killing, and therefore convicted only a charge of Second Degree Murder. Estelle v. McGuire, 112 S.Ct. 475 (1991). State v. Morley, Supra, involved the conviction of attempted burglary. It is true that the Reasonable Doubt Instruction in Morley was identical to the one given at Appellant's trial, however, having reasonable doubt as to attempted burglary can be quite different from a reasonable doubt as to murder. A

conviction of First Degree Murder carries with it the potential for the death sentence, and if a jury is at all confused or misled due to an instruction given by the Court, the ramifications of this confusion in a conviction of attempted burglary versus a conviction of First Degree Murder, are vastly different. Is it not better to err in favor of saving life rather than destroying it, particularly when the potential for confusion is so likely. If the jury believed a substantial doubt was required, as opposed to only a reasonable doubt, then it is inescapable that the Government's burden is reduced while at the same time increasing the Defendant's burden. The result is that the Reasonable Doubt Instruction given at Petitioner's trial was not in accord with the Due Process Clause of the Fourteenth Amendment.

Additionally, Petitioner contends that to equate reasonable doubt in a criminal trial with that of a reasonable doubt ". . . in one of the graver and more important transactions of life. . . " State v. Morley, 239 Neb. 141, 474 N.W.2d 660, 670 (1991), is to equate the balance of one's life and liberty with that of an important personal decision. While the Reasonable Doubt Instruction is couched in terms of causing a reasonable person to "hesitate to act" instead of "willing to act" in one of the "graver and more important transactions of life," Id. it is quite vague as to what is meant by a grave and important transaction in life. Is a grave and important transaction the pulling of life support systems of an injured family member? Is it a decision on whether to have an abortion? Or, is it buying a house or investing for

security at retirement? It is obvious that the personal experiences of one individual, which might be regarded as highly important and involving a grave decision to that individual, are not as highly important to another individual.

In State v. Morley, 239 Neb. 141, 474 N.W.2d 660 (1991), the Nebraska Supreme Court distinguished the language used in the reasonable doubt instruction with that of the language struck down Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990). As noted previously, retroactive application of the Cage decision is not at issue. The only question is whether the Nebraska Supreme Court properly interpreted the Cage decision as it applies to Petitioner's case.

It is emphasized that an Appellate Court must undergo consideration to determine whether there exists a "reasonable likelihood" that reasonable jurors could have understood the jury instruction charge as a whole. Estelle v. McGuire, 112 S.Ct. 475, 482 (1991). There is no question that the reasonable doubt instruction given at Petitioner's trial attempted to equate reasonable doubt with "substantial doubt," and that there is a high probability that a reasonable juror believed substantial doubt was required before voting for acquittal or a lesser charge.

The Eighth Circuit has frowned upon jury instructions which attempt to equate reasonable doubt with substantial doubt as the Eighth Circuit, along with several other circuits, believe that substantial doubt language lessens the burden of proof upon the Government. See, U. S. v. Atkins, 487 F.2d 257 (8th Cir. 1973);

Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990); U.S. v. Wright, 542 F.2d 975 (7th Cir. 1976).

In addition, the Federal Courts have determined that any jury instruction which,

> . . . utilizes substantial doubt language can and will require reversal unless it can be concluded beyond a reasonable doubt that the jury was not misled by the instruction.
>
> Monk v. Zelez, Supra at 890 (Emphasis added), citing, Chapman v. California, 386 U.S. 18, 29, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); Holland v. U.S., 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

Therefore, irregardless of whether the Nebraska Supreme Court whether or not this Court has purportedly distinguished the jury instruction language via the Morley decision, that Court must undertake an analysis to determine whether the jurors were misled at Petitioner's trial by the reasonable doubt instruction and must also conclude beyond a reasonable doubt that the jurors were not misled by this instruction.

This analysis has not been undertaken. There has been no independent determination that the jurors at Petitioner's trial were not misled by the reasonable doubt instruction. The fact remains that if the Appellate Courts in the State of Nebraska were confused as to the instruction and given that the particular instruction used at Petitioner's trial is no longer in use, it certainly is no leap to conclude that there existed a reasonable likelihood that the lay juror would have been confused or misled by the reasonable doubt instruction. Given the gravity of Petitioner's conviction and sentence and the high probability of

confusion among the jurors, the Supreme Court of Nebraska must undertake the above analysis and conclude beyond a reasonable doubt that the jurors were not misled by the instruction given at Petitioner's trial.

CONCLUSION

As noted from the above, the Nebraska Supreme Court decision in this case rendered on January 29, 1993 runs counter to United States Supreme Court decisions as well as decisions from the United States District Court for the District of Nebraska concerning post-conviction proceedings in general and the appointment of counsel and granting of evidentiary hearings in particular. The opinion of the Nebraska Supreme Court fails to justify its rationale with the carved exceptions to the "No Right to Counsel Rule" as outlined in Coleman v. Thompson, ___ U.S. ___, 59 U.S.L.W. 4789 (1991); Douglas v. California, 372 U.S. 353 (1963).

Additionally, sufficient evidence was presented to the Supreme Court on appeal for the Court to have noted that counsel for Petitioner at trial and on direct appeal attempted to assist Petitioner with respect to his Petition for Post Conviction Relief. These actions were tantamount to ineffective assistance of counsel because counsel was not competent to assist in such an appeal and further that in doing so, counsel created an irreparable conflict of interest with the Petitioner and denied Petitioner one of his most important appeals as of right.

ORIGINAL

No. 92-8894

In The

SUPREME COURT OF THE UNITED STATES

October Term 1993

CLARENCE VICTOR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

Petition For Writ Of Certiorari To The Nebraska Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 92-8894

In The

SUPREME COURT OF THE UNITED STATES

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CLARENCE VICTOR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts of the killing which prompted Victor's conviction and sentence of death, as well as the issues raised at trial and assigned and argued on the direct appeal of this matter are found in ***State v. Victor***, 235 Neb. 770, 457 N.W.2d 431 (1990), ***cert.den.*** ___ U.S. ___, 111 S.Ct. 1091.

The state trial court, in considering Victor's state post conviction motion, determined after a review of the petition and the records of his previous trial, conviction, sentence and appeal that it was not necessary under state post conviction statutes to appoint counsel to represent Victor at that stage of the proceeding. Further, the state trial court concluded that each of the issues Victor sought to raise in his post conviction proceeding had either been raised and addressed upon the direct appeal of his conviction and sentence, or the allegations of error contained in his petition for post conviction relief were "unsupported by any allegations of specific facts" adequate to necessitate an evidentiary hearing. Petitioner's Appendix C, p. 1-3.

ARGUMENT

I.

APPOINTMENT OF COUNSEL

Victor first complains that the federal constitution mandates that he be afforded legal counsel for the purposes of preparing and arguing his state post conviction motion. (Petitioner's Brief, Reason I.)

A.

There exists no federal constitutional right to counsel in state post conviction proceedings.

Murray v. Giarratano, 592 U.S. 1 (1989) was a death penalty case involving the question of whether, under the federal constitution, it was necessary for the state to appoint counsel for a state prisoner in a state post conviction proceeding. In that case this Court held that neither the 8th Amendment nor the Due Process Clause require the appointment of counsel for indigent death sentenced inmates seeking state post conviction relief. See also ***Pennsylvania v. Finley***, 481 U.S. 551 (1987).

B.

Under Nebraska law a post conviction proceeding is a form of relief wholly independent from the prisoner's state court criminal trial or his first appeal of the resulting criminal conviction.

The federal constitution does not demand that the states afford convicted criminals further avenues for seeking relief from a criminal conviction and sentence which have been obtained appropriately at a state court criminal trial and reviewed and affirmed by a state appellate court. Therefore, the nature of any such relief which is afforded by a state is solely a question of state law.

Under Nebraska law a state post conviction proceeding initiated pursuant to Neb. Rev. Stat. § 20-3001 *et seq.* (1989) is a civil remedy, **not** a direct extension of the state criminal trial or appellate process. (***State v. Luna***, 230 Neb. 966, 434 N.W.2d 526 (1989), an individual seeking post conviction relief has the burden of establishing a basis for such relief. ***State v. Pratt***, 224 Neb. 507, 398 N.W.2d 721 (1987), a motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated). No state statute, rule or practice guarantees an individual seeking state post conviction relief the right to appointment of counsel at any stage of that proceeding absent specific findings by the state trial court.

Therefore, the only question remaining is whether the federal constitution **requires** that a state which has chosen to create a post conviction remedy also afford such an applicant, if indigent, counsel to assist in that process. As noted above, we believe that question has been already answered by this Court in ***Murray v. Giarratano***.

Victor relies upon the theory that since his state post conviction proceeding is his first opportunity to raise his ineffective assistance of counsel claim, that his state post conviction proceeding, at least on that issue, undergoes a constitutional metamorphosis, and becomes not the civil remedy envisioned by the Nebraska legislature, but his first "appeal of right". Victor is wrong on the facts and the law in reaching this conclusion.

First, there is nothing in Nebraska law or practice which prevents a claim of ineffective assistance of counsel being raised as a part of the criminal defendant's criminal trial and direct appeal. Second, the "one and only appeal" discussed in ***Douglas v. California***, 372 U.S. 353 (1963), was specifically a convicted criminal's **direct appeal** of his or her conviction. Nothing in ***Coleman v. Thompson***, 501 U.S. ___, 115 L.Ed.2d 640 (1991) purports to alter this Court's previous articulation of this proposition.

It requires a significant leap--one far beyond the bounds of the federal constitution as we currently understand it--to conclude that an indigent prisoner's right to counsel in the direct appeal of his criminal conviction is in any respect analogous to whether

a similar right must be afforded in a separate and distinct state court civil proceeding.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

Frankly, we are not certain that we can articulate what Victor's ineffective assistance of counsel argument is. *See* Petitioner's Brief, Reason II. The text appears to be simply a copy of an argument made to the Nebraska Supreme Court in the proceeding from which Victor seeks the writ of certiorari.

To the extent that we understand it, Victor appears to claim that he received ineffective assistance of counsel **not** during his criminal trial and direct appeal, but in the preparation of his petition for state post conviction relief about which he had just complained about having to proceed **without** counsel. See Brief of Petitioner, p. 30-31.

A.

Victor had no counsel

The first problem arises with regard to Victor's complaint regarding ineffective assistance of counsel based upon an allegation of a conflict of interest.

Victor filed his post conviction motion **pro se**. (Petitioner's Brief, p. 8-9) Ironically, Victor argued earlier that it was his **lack** of counsel which renders the state post conviction proceeding constitutionally deficient. *See* Petitioner's Brief, Reason I. Now he would have it the other way around. Now he argues that the counsel he **did** have representing his interests before the state

trial court rendered him ineffective assistance under the federal constitution due to a conflict of interest. It is either amazing or amusing that Victor should argue his plight with respect to counsel in the alternative. Either he had counsel or he did not.

No appearance was entered on Victor's behalf in the state trial court. The record indicates and Victor admits, when it suits him, that he had no counsel before the state trial court. "It should be mentioned that at all times during these [state post conviction] proceedings *** that [Victor] was Pro Se." Petitioner's Brief, p. 9. If, then, he had no counsel before the state trial court, then the counsel he did not have certainly could not have rendered him ineffective assistance due to a conflict of interest.

Victor ignores this awkwardness in the record and proceeds to buttress his latest version of his plight before the state trial court, not by reference to the record, but by pure speculation. Petitioner's Brief, p. 29. Such speculation is not sufficient to carry his cause before this Court even if the error had been properly raised, assigned and argued before the Nebraska Supreme Court.

B.

Waiver

In Victor's post conviction motion before the state trial court he listed seven specific complaints. Yet in his brief before the Nebraska Supreme Court Victor argued two new issues: (1) that his state post conviction counsel before the district court

suffered from a conflict of interest (Brief of Appellant, p. 28-31); and (2) that his trial counsel failed to properly support or pursue the motion for change of venue which was filed and denied at trial. Neither of these issues are among the seven issues presented to the state trial court for decision by Victor's post conviction motion.

Thus, the only two issues argued by Victor to the Nebraska Supreme Court with respect to ineffective assistance of counsel were neither raised before the state trial court nor assigned as error on appeal. As such, the only two propositions argued in support of Victor's allegations of ineffective assistance were not presented to the state trial court for decision and were thus not properly presented to the Nebraska Supreme Court, while the allegations of error which were raised before and resolved by the state trial court were apparently abandoned on appeal. This constitutes a waiver of each issue.

The Nebraska Supreme Court has long held it will only consider errors which are ***assigned and argued*** by the Appellant. ***State v. Thomas***, 236 Neb. 568, 462 N.W.2d 618 (1990). Furthermore, allegations of error articulated for the first time in the argument of an appellant's brief are not properly presented for decision.

III.

THE REASONABLE DOUBT INSTRUCTION

Victor correctly points out that the Nebraska Supreme Court has reviewed Nebraska's most common reasonable doubt instruction in view of this Court's opinion in ***Cage v. Louisiana***, 498 U.S. ___,

111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and found that the Nebraska instruction did not suffer the same infirmity identified by this Court in ***Cage***. ***See State v. Morley***, 239 Neb. 141, 474 N.W.2d 660 (1991). Victor also correctly points out that the reasonable doubt instruction about which he complains and the instruction approved by the Nebraska Supreme Court in ***Morley*** are identical.

A.

At the outset we note that any interpretation of a reasonable doubt instruction which **enhances** the concept of reasonable doubt in the mind of a reasonable juror works to the **benefit** of the criminal defendant. The more difficult it becomes to achieve a reasonable doubt, the more difficult it is for the state to establish the defendant's guilt of the crime charged **beyond** a reasonable doubt.

To the extent that the Nebraska reasonable doubt instruction might be argued to move the concept of reasonable doubt from that amorphous point required by the Due Process Clause, the Nebraska instruction makes it more difficult for the state to convict. Victor may only legitimately complain if the instruction made it easier for the state to convict him. That did not occur here.

B.

In applying ***Cage*** to Nebraska's reasonable doubt instruction, the Nebraska Supreme Court stated:

> It is true that both the ***Cage*** instruction and the [Nebraska] instruction tell the jury that, in effect, a reasonable doubt is an actual and substantial one. But while the ***Cage*** instruction also equates a reasonable doubt with a grave one,

the [Nebraska] instruction does not. The [Nebraska] instruction merely advises that a reasonable doubt is such as would cause a person "to pause and hesitate" when considering one of the "graver and more important transactions of life." Moreover, while a reasonable reading of the *Cage* instruction leads to the conclusion that an accused is to be convicted unless such doubt raises to the level of a moral certainty, the [Nebraska] instruction permits conviction **only** if the **lack** of such doubt is established to a moral certainty. In other words, under the *Cage* instruction a juror is to vote for conviction unless convicted to a moral certainty that there **exists** a reasonable doubt, whereas under the [Nebraska] instruction a juror is to vote for **acquittal** unless convinced to a moral certainty that no reasonable doubt exists. These are two very different instructions; indeed, one contradicts the other.

Morley, 239 Neb. at 155, 474 N.W.2d at 670 (emp.added).

If anything, the instruction under which Victor was convicted made it more difficult than required by the Due Process Clause of the federal constitution to convict him of his crime, but in a case where the defendant's guilt has been established beyond question, much less beyond a reasonable doubt, neither the federal constitution nor our generic sense of "justice" can be offended by this verdict.

CONCLUSION

The reasons forwarded by Victor to prompt the issuance of the writ prayed for simply do not merit the relief prayed for. The petition should be denied.

Respectfully submitted,

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June 23, 1993

PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, J. K. Brown, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the Petitioner by depositing said copies in the United States Mail, certified and return receipt postage prepaid, addressed to Petitioner's counsel of record, Mark A. Weber and J. Joseph McQuillan, 11301 Davenport Street, Omaha, NE 68154, on this 23rd day of June, 1993.

J. K. Brown
Affiant

Subscribed in my presence and sworn to before me this 23rd day of June, 1993.

GENERAL NOTARY-State of Nebraska
BEVERLY A. EPKE
My Comm. Exp. March 24, 1994

Beverly H. Epke
Notary Public

45-209-2

GENERAL NOTARY-State of Nebraska
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My Comm. Exp. March 24, 1994

Supreme Court, U.S.
FILED
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
October Term, 1993

STATE OF NEBRASKA Plaintiff/Appellee v. CLARENCE VICTOR Defendant/Appellant	)	Case No. 92-8894 **SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA**

COMES NOW the Petitioner, Clarence Victor, by and through his Court-Appointed Counsel of Record, and as a supplement to the Petition for Writ of Certiorari filed with the Court on May 28, 1993, alleges and states as follows:

1. That subsequent to the date of filing of the Petition for Writ of Certiorari with this Court, Counsel became aware of this Court's decision in Sullivan v. Louisiana, (No. 92-5129, 1993 U S LEXIS 3741 (June 1,1993)).

Court-Appointed Counsel for the Petitioner would merely point out to the Court that the issues raised in Sullivan v. Louisiana, Supra, are identical presented in Petitioner's pending Petition for Writ of Certiorari before this Court. Further, Counsel points to the validity of the argument raised in his Petition for Writ of Certiorari by virtue of this Court's decision in Sullivan v. Louisiana, Supra, in support of Petitioner's Motion for Stay of Execution filed on even date with the filing of the Petition for Writ of Certiorari.

Respectfully submitted,

CLARENCE VICTOR, Petitioner,

By_____

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Certificate of Service

The undersigned certifies that a copy of the foregoing Supplement to Petition for Writ of Certiorari to the Supreme Court of the State of Nebraska was served by United States postage prepaid on:

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on the _____ day of June, 1993.

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Re: Petition for Certiorari -- Clarence Victor
Case No. 92-8894

Dear Chris:

Enclosed is a Supplement to Petition for Writ of Certiorari for filing with your office. I have enclosed the original and ten copies of the pleading.

Thank you.

Sincerely yours,

MARK A. WEBER
For the Firm

MAW:j
Enclosures
cv10.maw

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No. 92-8894

In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

NEBRASKA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nebraska

JOINT APPENDIX

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Petition For Certiorari Filed June 1, 1993
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5/28/93	Motion to Reconsider
6/3/93	(Neb. S.Ct.) Denied
6/1/93	Petition for Stay of Execution Filed
6/1/93	Petition for Cert. to US S.Ct.
6/8/93	(US S.Ct.) Stay of Execution Granted
9/28/93	(US S.Ct.) Petition for Cert. Granted

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff, - vs - CLARENCE VICTOR, Defendant.	)	Docket 122 No. 046 INSTRUCTIONS TO THE JURY

LADIES and GENTLEMEN OF THE JURY:

You are now instructed by the Court in this case as follows:

INSTRUCTION NO. 1

It now becomes my duty to instruct you in the law. All questions of fact are to be decided by you, the jury, and to these facts you will apply the law given to you in all these instructions, even though you believe that the law should be otherwise.

No attempt has been made to embody all the law applicable to this case in any one instruction. Therefore, any one instruction should be considered in the light of all the others.

In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence. You should not consider any evidence which has been stricken from the record; you should not be

influenced by statements of counsel not supported by evidence. Each of you may apply to the subject before you that general knowledge which anyone of you may be presumed to have, yet, if any of you be personally acquainted with any material or particular fact not supported by the evidence, you should not consider your personal knowledge of such fact or mention it to your fellow jurors.

INSTRUCTION NO. 1 (Page 2)

You must not construe any statements, actions, or rulings of the court in the trial of this case, nor any of the inflections of the voice in the reading of these instructions, as reflecting an opinion of the court as to how this case should be decided.

You will allow no sympathy or prejudice for or against either party to influence you in arriving at your verdict. The law demands of you a just verdict uninfluenced by sympathy or prejudice or any considerations outside the evidence and the law as given you in these instructions.

On the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements in this Section I, it is your duty to find the defendant not guilty of the crime of murder in the first degree. You shall then proceed to consider the lesser included offense of murder in the second degree, set out in Section II below.

SECTION II

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of murder in the second degree are:

1. That defendant Clarence Victor on or about December 26, 1987, did kill Alice Singleton;

2. That he did so in Douglas Couinty [sic], Nebraska; and

3. That the defendant did so intentionally, but without premeditation.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements in this Section II is true, it is your duty to find the defendant guilty of the crime of murder in the second degree and you shall not then consider the lesser included offense hereinafter set forth in Section III of this instruction.

On the other hand, you find that the State has failed to prove beyond a reasonable doubt any one or more of the material elements, it is your duty to find the defendant not guilty of the crime of murder in the second degree. You shall then proceed to consider the lesser included offense of manslaughter set out in Section III below.

SECTION III

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of manslaughter are:

1. That defendant Clarence Victor on or about December 26, 1987, did kill Alice Singleton.

2. That he did so in Douglas County, Nebraska;

3. That the defendant killed Alice Singleton without malice, either upon a sudden quarrel or unintentionally while the defendant was in the commission of an unlawful act, such as an assault upon Alice Singleton.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements has been proved beyond a reasonable doubt, it is your duty to find the defendant guilty of the crime of manslaughter. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of manslaughter and not guilty of any charge in this case.

INSTRUCTION NO. 2

This is a criminal action prosecuted by the State of Nebraska against the defendant upon an Information filed by the County Attorney of Douglas County, Nebraska, pursuant to law.

In the Information in Count I, it is charged in substance that:

On or about the 26th day of December, 1987, in Douglas County, Nebraska, the defendant, Clarence Victor, did then and there purposely and with deliberate and premeditated malice kill Alice Singleton.

In the Information in Count II, it is charged in substance that:

On or about the 26th day of December, 1987, in Douglas County, Nebraska, the defendant, Clarence Victor, did then and there use a knife or a deadly weapon to commit a felony, which may be prosecuted in a court of this state, both Counts I and II contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

To these charges the defendant has entered a plea of not guilty. The charges and the defendant's plea make up the issues which you will determine by your verdict.

INSTRUCTION NO. 3

The Information, or the fact that the County Attorney has filed the Information, is not to be considered by you as evidence. The Information simply contains the charges upon which the defendant is to be tried.

INSTRUCTION NO. 4

Under Count I of the Information in this case, depending on the evidence, you may find the defendant:

(1) Guilty of murder in the first degree in that defendant Clarence Victor killed Alice Singleton purposely and with deliberate and premeditated malice; or

(2) Guilty of murder in the second degree; or

(3) Guilty of manslaughter; or

(4) Not guilty.

SECTION I

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of first-degree murder are:

1. That defendant Clarence Victor, on or about December 26, 1987, did kill Alice Singleton.

2. That the defendant did so in Douglas County, Nebraska; and

3. That the defendant killed Alice Singleton purposely and with deliberate and premeditated malice.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the crime of murder in the first degree and you must not then consider the other lesser included offenses hereinafter set forth in sections II and III of this instruction.

INSTRUCTION NO. 5

The material elements which the State must prove by evidence beyond a reasonable doubt in order to convict the defendant of the crime of use of a knife or a deadly weapon to commit a felony in Count II are:

1. That on or about the 26th day of December 1987, in Douglas County, Nebraska, the defendant Clarence Victor did commit murder in the first degree, murder in the second degree, or manslaughter, which is the subject of Count I of this Information.

2. That in the commission of said murder in the first degree, murder in the second degree, or manslaughter, a knife or a deadly weapon was used;

3. That such use of a knife or deadly weapon to commit a felony was intentional.

The State has the burden of proving beyond a reasonable doubt each and every one of the foregoing material elements necessary for conviction.

If you find from the evidence beyond a reasonable doubt that each of the foregoing material elements is true, it is your duty to find the defendant guilty of the use of a knife or a deadly weapon to commit a felony as charged in Count II. On the other hand, if you find the State has failed to prove beyond a reasonable doubt any one or more of the foregoing material elements, it is your duty to find the defendant not guilty of the use of a knife or deadly weapon to commit a felony as charged in Count II.

The burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts.

INSTRUCTION NO. 6

The statutes of the State of Nebraska in full force and effect at the time alleged in the Information provided in substance as follows:

A person commits murder in the first degree if he kills another person purposely and with deliberate and premeditated malice. . . .

A person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation.

A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act.

Any person who uses a . . . knife . . . or any other deadly weapon . . . to commit any felony which may be prosecuted in a court of this state . . . may be punished as provided by law.

Any person found guilty of the violation of such statues shall be punished as provided by law.

INSTRUCTION NO. 7

"Deliberate" is defined as not suddenly, not rashly; but requires that the defendant considered the probable consequences of his act before doing the act.

"Malice" is defined as that condition of the mind which is shown by intentionally doing a wrongful act without just cause or excuse. It means any willful or corrupt intention of mind.

"Premeditated" is defined as conceived or thought of beforehand; already meditated upon before doing the act.

"Purposely" is defined as meaning intentionally.

A "knife" shall mean any dagger, dirk, knife, or stiletto with a blade three and half inch in length, or any other dangerous instrument capable of inflicting cutting, stabbing or tearing wounds.

A "deadly weapon" shall mean any knife, or other device, instrument, material or substance, either animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.

"Any felony" as used in the statute regarding the use of a knife or deadly weapon, includes murder in the first degree, murder in the second degree, or manslaughter.

"Assault" is injuring another person intentionally, knowingly, or recklessly or threatening another person in a menacing manner.

An assault in any degree is, under the Nebraska Criminal Code, an unlawful act within the meaning of the manslaughter statute.

INSTRUCTION NO. 8

While the law requires, in order to constitute murder in the first degree, that the killing shall be willful, deliberate and premeditated, still, it does not require that the willful intent, premeditation or deliberation, shall exist for any length of time before the crime is committed; it is sufficient if there was a design and determination to kill distinctly formed in the mind at any moment before the killing took place, even though such design and determination to kill was formed in the mind only immediately before the killing took place.

You are instructed, therefore, that if you believe from the evidence, beyond a reasonable doubt, that the defendant killed Alice Singleton, as charged in the Information; and that before he killed Alice Singleton the defendant

had formed in his mind a willful, deliberate and premeditated design or purpose to take the life of Alice Singleton, and that the act of killing her was in furtherance of that design or purpose and was without any justifiable cause or legal excuse therefor, then the defendant had the purpose and deliberate and premeditated malice required to be guilty of murder in the first degree.

INSTRUCTION NO. 9

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

INSTRUCTION NO. 10

Intent is a material element of the crime charged against the defendant. Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. It is rarely – if ever – susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before that intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent. It is for you to determine from all the facts and circumstances in evidence whether or not the defendant committed the acts complained of and whether at such time he had the criminal intent. If you have any reasonable doubt with respect to either, you must find the defendant not guilty.

INSTRUCTION NO. 11

Evidence is either direct or circumstantial.

Evidence is direct when a witness testifies from his own personal knowledge concerning a material element of the crime charged. Evidence is circumstantial when it relates to the existence or nonexistence of facts from which a material element of the crime charged may be inferred and when that inference usually and reasonably follows according to the common experience of mankind.

A material element of a crime may be established by circumstantial evidence alone so long as such evidence taken as a whole establishes such element beyond a reasonable doubt.

INSTRUCTION NO. 12

The state has introduced in evidence certain statements claimed to have been made by the defendant.

Before such statements may be considered by you as evidence of defendant's guilt, you must find beyond a reasonable doubt that they were freely, voluntarily, and intelligently made by the defendant.

Before you may find that they were "freely and voluntarily" made, you must find:

a. That they were not procured or induced by promises directly or indirectly made by persons in authority, or by other persons that such statements would result in benefit or advantage to defendant; and

b. That they were not obtained as a result of force, fear oppression, or coercion.

To be voluntary, a statement does not have to proceed wholly or spontaneously at the suggestion of the defendant. The fact that it may have been elicited by questions propounded by persons in authority or other persons who were interrogating the defendant will not, of itself, render it inadmissible.

Before you may find that they were "intelligently" made, you must find that they were made with knowledge and understanding of what was said, without mental confusion, and with mental appreciation of what was said.

INSTRUCTION NO. 12
(Cont'd)

Therefore, if you find beyond a reasonable doubt that the statements were made by the defendant and were made freely, voluntarily, and intelligently, you may consider them in your deliberations and give them such weight as you deem them entitled to. But if you do not so find, it is your duty to disregard them completely and you must not consider them for any purpose, whether or not you may happen to think they are true.

INSTRUCTION NO. 13

Certain witnesses have been called who testified as expert witnesses. You are not required to take the opinions of experts as binding upon you, but they are to be used to aid you in coming to a proper conclusion. Their testimony is received as that of persons who are learned by reason of special investigation, study or experience along lines not of general knowledge, and the conclusion of such persons may be of value. You may adopt, or not, their conclusions, according to your own best judgment, giving in each instance such weight as you think should be given under all the facts and circumstances of the case.

In determining the weight to be given such testimony you should consider, among other things:

1. The education, training, experience and knowledge of the expert with respect to the matters about which he testified.
2. The reasons given for his opinion.
3. The sources of his information.

INSTRUCTION NO. 14

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:

1. Their interest in the result of the suit, if any;
2. Their conduct and demeanor while testifying;
3. Their apparent fairness or bias or relationship to the parties, if any such appears;
4. Their opportunity for seeing or knowing the things about which they have testified;
5. Their ability to remember and relate accurately the occurrences referred to in their evidence;
6. The extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses;
7. The reasonableness or unreasonableness of their statements;
8. Evidence of previous statements or conduct inconsistent with their testimony at this trial (if any such evidence has been adduced); and
9. All other evidence, facts, and circumstances proved tending to corroborate or contradict such witnesses.

INSTRUCTION NO. 15

You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusions or inferences as to his reasons in that regard.

INSTRUCTION NO. 16

You have nothing whatever to do with the punishment of the defendant in the event of his conviction. Therefore, in determining his guilt or innocence, you have no right to take into into [sic] consideration what punishment he may or may not receive in the event of his conviction.

INSTRUCTION NO. 17

You will take these Instructions and the forms of verdict which have been prepared for your use, retire to your jury room, select your foreman, either man or woman, commence upon your deliberations, and, from the evidence before you and the law as given you in these Instructions, determine upon your verdict.

You should deliberate with open minds, give respectful consideration to the opinions of fellow jurors, freely exchange views or opinions concerning the case, and not be hesitant to change your minds when reason and logic so dictate.

During any time that you are not deliberating in the jury room, you shall not converse or communicate with any other juror or person on the subject of this trial, and you shall not listen to, read, or observe any account or

comment on that subject until you reconvene for deliberation.

If you do not agree upon a verdict by 5:00 o'clock P.M., you may separate and return for deliberation at 9:00 o'clock A.M. tomorrow, but in such event during such separation you are admonished not to converse or communicate with any other juror or person on the subject of this trial, and you shall not listen to, read, or observe any account or comment on that subject until you reconvene.

Your verdict must be unanimous and will be signed by your foreman only.

SEVEN forms of verdict are submitted herewith. You will complete only one form but return all forms.

Submitted at 12:24 o'clock P.M. on this 21st day of July, 1988.

BY THE COURT:

/s/ Illegible
District Judge

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

(Caption Omitted In Printing)

DOC. 122 NO. 046

MOTION FOR NEW TRIAL

(Filed July 26, 1988)

COMES NOW the Defendant and respectfully moves the Court to grant him judgment of acquittal notwithstanding the verdict, or, in the alternative, to vacate and set aside the verdict of guilty rendered herein, and to grant the Defendant a new trial, for the following reasons, and each of them:

1. That there were irregularities in the proceedings of the Court, the prosecuting attorney, and the witnesses for the State prejudicial to the rights of the Defendant.

2. That there was misconduct on the part of the jury, the prosecuting attorney, and the witnesses for the State prejudicial to the rights of the Defendant.

3. That there were abuses of discretion by the trial court which prevented the Defendant from having a fair trial.

4. That the verdict was not supported by sufficient evidence.

5. That the verdict is contrary to law.

6. That errors of law on the part of the trial court prevented the Defendant from having a fair trial.

7. That the Court erred in giving the instructions herein and in giving each of said instructions.

8. That the Court erred in not sustaining Defendant's motion for directed verdict made at the close of the State's evidence and renewed at the end of all the evidence.

CLARENCE VICTOR, Defendant,

By /s/ Shannon P. O'Connor
Shannon P. O'Connor, #18004
Assistant Public Defender
Attorney for Defendant

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

(Caption Omitted In Printing)

DOC. 122 NO. 046

MOTION TO VACATE SENTENCE AND
CONVICTION UNDER NEB. REV. STAT. 29-3001

(Filed May 10, 1991)

COMES NOW the Defendant pursuant to the Nebraska Post Conviction Act. (*Neb. Rev. Stat.* 29-3001 *et. seq.*), the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Untied [sic] States Constitution, and Article I, Sections 3, 6, 7, 9, 10, 11, 12, 16, and 26 and Article II of the Nebraska Constitution and moves this Court for a hearing and thereafter, an Order vacating his conviction and setting aside his sentence of death in the above entitled case.

In support of this motion, the Defendant states as follows:

1. The Defendant was convicted by a jury of Murder in the First Degree and Use of a Weapon to Commit a Felony and was sentenced to death by electrocution on the homicide charge and a consecutive 20 years imprisonment for the weapons charge. Said sentence was imposed on November 21, 1988.

2. The Defendant's conviction and sentence was affirmed on direct appeal to the Nebraska Supreme Court. *State v. Victor,* 235 Neb. 770, ___ N.W.2d ___ (1990). Further, the Defendant's petition for Writ of Certiorari to the Nebraska Supreme Court was denied by the U.S. Supreme Court on February 25, 1991, *Victor v. Nebraska* No. 90-6259, 48 CrL. 3152.

3. That the Defendant has not previously filed a motion seeking relief under the Nebraska post conviction act, sec. 29-3001 et. seq.

4. The Defendant was denied due process of law in violation of the Fifth and Fourteenth Amendment of the U.S. Constitution and Art. I Sec. 3 of the Nebraska Constitution in that the trial court improperly instructed the jury on the law with regard to the concept of "Reasonable Doubt."

The trial court gave the following instruction:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you after full, fair and impatrial [sic] consideration of all the evidence, to have an abiding conviction. to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find and [sic] accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

This instruction is taken from NJI 14.08. The United States Supreme Court has recently held that a similar instruction violates due process of law. *See Cage v. Louisianna* 48 CrL 3062, ___ U.S. ___, ___ Spr. Ct. ___ (1990).

Since the primary defense asserted at trial by Defendant was that the state had insufficient evidence to prove the elements of premeditation and deliberation beyond a reasonable doubt, the Defendant was prejudiced by the courts instruction to the jury of this constitutionally infirm definition of reasonable doubt.

5. That the reweighing process of the aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution Art. I secs. 3, 9, and 13 of the Constitution of the State of Nebraska.

The Nebraska Supreme Court has said on numerous occasions that balancing of aggravating against mitigating circumstances is not merely a matter of number counting but rather requires a careful reweighing and examination of the various factors. *See State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989), *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). In spite of this, the Nebraska Supreme Court, in reweighing aggravating circumstance Sec. 29-2523 (1)(a) refused to differentiate between the weight such aggravator should be given if the Defendant's prior convictions for Second Degree Murder and Manslaughter were both to be considered or if only his conviction for Second Degree Murder could be considered.

Obviously, if only one prior conviction could be used, aggravating circumstance (1)(a) would be present, but to

a substantially lesser degree than if both priors could be considered. Thus, the reweighing process used by the Nebraska Supreme Court is improper and prejudiced the Defendant in violation of *Clemmons v. Mississippi* 46 CrL. 2209 ___ U.S. ___, ___ Spr. Ct. ___ (1990).

6. That the death penalty imposed upon the Defendant was done in violation of the Eighth and Fourteenth Amendment [sic] of the Constitution of the United States and Art. I secs. 3 and 12 of the Nebraska Constitution in that the sentencing panel relied upon aggravating circumstance (1)(d) of Sec. 29-2523 *Neb. Rev. Stat.* (1943), which section is unconstitutionally vague and results in an arbitrary imposition of capital punishment.

7. That the sentencing panel and Nebraska Supreme Court refused to follow the U.S. Supreme Court's holding in *Lockett v. Ohio* 438 U.S. 586, 98 Spr. Ct. 2954 (1978) requiring consideration of all mitigating factors whether statutory or otherwise. Thus by deciding that aggravating circumstances Sec. 29-25 23 (2)(g) did not exist and totally refusing to consider the Defendant's inability to conform his conduct to law because of mental defect or intoxication the Defendant's rights under the Eighth and Fourteenth Amendment [sic] to the U.S. Constitution were violated.

8. That the death penalty imposed upon the Defendant was in violation of *Neb. Rev. Stat.* Sec. 29-2521.03 in that neither the sentencing panel nor the Supreme Court followed the requirement of comparing the facts of the Defendant's case with other "criminal homicides" with

the same or similar circumstances to determine the proportionality with the Defendant's sentence with the results of similar cases.

Such failure to conduct a significant proportionality review also constitutes a violation of the Eighth and Fourteenth Amendments of the Constitution of the United States.

9. That the sentencing panel erred by admitting into evidence at the sentencing hearing, the Defendant's confession to a 1964 homicide which resulted in a manslaughter conviction. Absent this confession there is no evidence to support considering that incident for purposes of Sec. 29-2523 (1)(a) *Neb. Rev. Stat.* The confession did not conform to the requirements of *Miranda v. Arizona*, 384 U.S. 436, 86 Spr. Ct. 1602 (1966) in that the evidence is uncontroverted that the police did not apprise the Defendant of his Fifth and Sixth Amendment rights under the U.S. Constitution. Therefore, the use of this statement to prove an aggravating circumstance was erroneous and a violation of the Fifth, Sixth, and Fourteenth of the U.S. Constitution and Art. I Secs. 3 and 12 of the Constitution of the State of Nebraska.

10. That the Defendant's confession was obtained in violation of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution in that it was not voluntary, it was the product of an unlawful arrest and was obtained without a valid waiver of his so called Miranda rights.

11. That trial and appelate [sic] counsel was ineffective in failing to raise or improperly raising each of the

aforementioned issues in violation of Defendant's Sixth Amendment right to effective assistance of counsel.

WHEREFORE the Defendant moves that he be granted an evidentiary hearing and that, thereafter, his conviction and sentence be set aside and vacated.

CLARENCE VICTOR, Defendant.

by /s/ Clarence Victor
CLARENCE VICTOR,
Defendant
P.O. Box 2500
Lincoln, NE

(Verification Caption Omitted In Printing)

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

(Caption Omitted In Printing)

DOCKET 122 PAGE 046

ORDER

Defendant has filed a motion to vacate sentence and conviction pursuant to Section 29-3001, R.R.S. 1943, the Nebraska Post Conviction Act. Having reviewed defendant's motion and the files and records of this case, the Court finds that no evidentiary hearing is required and that defendant's motion should be overruled.

Defendant contends that his constitutional rights were violated in that the Court utilized the instruction on reasonable doubt that is provided in NJI 14.08, which has been extensively utilized and has been approved by the Nebraska Supreme Court. Defendant contends that in *Cage v. Louisiana,* 498 U.S. ___, 111 S. Ct. 328, 112 L.Ed. 2d 339 (1990), the Court held that such an instruction violates due process of law. The decision in *Cage* was rendered after defendant's conviction and affirmance of such conviction on appeal to the Nebraska Supreme Court. *Cage* does not indicate if its effect is retroactive. The Court determines that it should not be applied retroactively. *See Kernes v. Grammer,* 227 Neb. 165, 416 N.W. 26 253 (1987); *State v. Clark,* 217 Neb. 417, 350 N.W.2d 521 (1984); *Teague v. Lane,* 489 U.S. 288.

Defendant contends that the re-weighing process utilized by the Nebraska Supreme Court was improper and prejudicial to the defendant. The Court determines as a matter of law that the Nebraska Supreme Court did reweigh and examine the various factors that it found were established.

The Court finds that as a matter of law, the defendant's contention that Aggravating Circumstance 1-D of Section 29-2523, R.R.S. 1943, is unconstitutionally vague, is without merit.

Defendant's contention that the sentencing panel and the Nebraska Supreme Court failed to consider all mitigating factors, whether statutory or otherwise, is not supported by the record and by the opinion of the Nebraska Supreme Court.

Defendant's contention that neither the sentencing panel nor the Supreme Court followed the statutory requirement of comparison of defendant's case with other criminal homicides with the same or similar circumstances to determine their proportionality is not supported by the record or by the opinion of the Nebraska Supreme Court.

Defendant's contention that the sentencing panel erred by admitting into evidence at the sentencing hearing defendant's confession of a 1964 homicide resulting in a manslaughter conviction is without merit as a matter of law.

Defendant's contention that his confession was obtained in violation of his constitutional rights was raised by the defendant prior to trial, during trial, and on appeal to the Nebraska Supreme Court. His contention is without merit as a matter of law.

Defendant finally contends that trial and appellate counsel was ineffective in failing to raise or improperly raising each of the aforementioned contentions in violation of his Sixth Amendment right to effective assistance

of counsel. The Court determines as a matter of law that each of the aforementioned contentions either were raised on appeal to the Nebraska Supreme Court or the contention arose after his trial and final judgment by the Nebraska Supreme Court. Defendant's claim that his contentions were improperly raised on appeal constitutes a conclusion unsupported by any allegations of specific facts in that regard.

WHEREFORE, IT IS ORDERED, defendant's motion that he be granted an evidentiary hearing on the post conviction motion be and the same is hereby overruled.

IT IS FURTHER ORDERED that defendant's motion to vacate sentence and conviction be and the same is hereby overruled.

Dated this 17th day of September, 1991.

BY THE COURT:

/s/ Illegible
JUDGE

SUPREME COURT OF NEBRASKA

State of Nebraska, Appellee,
v.
Clarence Victor, Appellant.

Filed January 29, 1993. No. S-91-933.

Appeal from the District Court for Douglas County: James A. Buckley, Judge. Affirmed.

STATE V. VICTOR

NO. S-91-933 – filed January 29, 1993.

1. Postconviction: Appeal and Error. In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous.

2. Postconviction. An evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief.

3. Postconviction: Appeal and Error. A motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal. It is not the purpose of affording postconviction relief to permit the defendant endless appeals on matters already decided.

4. ___: ___. In the absence of a factual allegation, an initial demonstration of an extraordinary and relevant novel argument, or a reference to binding precedent not appearing in the record on direct appeal, errors of a state appellate court that are assigned for review before a state

trial court in a motion for postconviction relief are without merit.

5. Effectiveness of Counsel: Proof: Appeal and Error. A defendant who asserts a claim of ineffective assistance of counsel and who seeks reversal of his convictions must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.

6. Appeal and Error. Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition.

7. Effectiveness of Counsel: Appeal and Error. When a claim of ineffective assistance of counsel has not been raised or ruled on by the trial court *and* necessitates an evidentiary hearing, the matter will not be addressed on appeal.

8. Postconviction: Right to Counsel: Appeal and Error. Under Neb. Rev. Stat. § 29-3004 (Cum. Supp. 1992), a district court may appoint an attorney to represent a prisoner in all postconviction proceedings under Neb. Rev. Stat. §§ 29-3001 through 29-3004 (Reissue 1989 & Cum. Supp. 1992). This power is within the discretion of the district court, and failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.

9. Constitutional Law: Postconviction: Right to Counsel: Death Penalty. Neither the Eighth Amendment nor the Due Process Clause of the federal Constitution requires states to appoint counsel for indigent death row inmates seeking state postconviction relief.

10. Postconviction: Right to Counsel. Where the record shows that a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel.

Hastings, C.J., Boslaugh, White, Caporale, Shanahan, Grant, and Fahrnbruch, JJ.

WHITE, J.

The defendant, Clarence Victor, appeals a decision of the district court for Douglas County to deny his pro se request for postconviction relief under Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1989 and Cum. Supp. 1992).

Victor was convicted of first degree murder and use of a weapon to commit a felony in the 1987 death of 82-year-old Alice Singleton. Victor was sentenced to death for the murder offense and given a consecutive sentence of 20 years for the felony weapon offense. The convictions were upheld on direct appeal. *State v. Victor,* 235 Neb. 770, 457 N.W.2d 431 (1990) (*Victor I*). The U.S. Supreme Court denied Victor's application for a writ of certiorari, *Victor v. Nebraska,* ___ U.S. ___, 111 S. Ct. 1091,

112 L. Ed. 2d 1195 (1991), and Victor sought state postconviction relief from the district court. Victor was represented at both the trial and the appellate level by the same attorney, but was denied court-appointed counsel on his motion for postconviction relief.

Defendant sought relief from the district court based on alleged violations of the 4th, 5th, 6th, 8th, and 14th Amendments to the U.S. Constitution and alleged violations of article I, §§ 3, 9, and 13, of the Nebraska Constitution. These claims summarily contended that (1) the trial court improperly instructed the jury on the law regarding the concept of "reasonable doubt"; (2) the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional; (3) the death penalty was improperly imposed because the aggravating circumstance in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) is vague and results in an arbitrary imposition of capital punishment; (4) the sentencing panel and the Nebraska Supreme Court erroneously refused to consider defendant's inability to conform his conduct to law because of mental defect or intoxication as required by § 29-2523 (2)(g); (5) neither the sentencing panel nor the Nebraska Supreme Court compared the facts of defendant's case with other "criminal homicides" of same or similar circumstances to determine the proportionality of defendant's sentences with the results of similar cases; (6) at the sentencing hearing, the sentencing panel erroneously admitted defendant's confession to a 1964 homicide because the confession did not conform to *Miranda* requirements; (7) defendant's confession to the present homicide was not voluntary, was a product of an unlawful arrest, and was obtained without

a valid waiver of his *Miranda* rights; and (8) trial and appellate counsel was ineffective in failing to raise or in improperly raising each of the aforementioned issues.

On September 17, 1991, the district court denied defendant's motion for an evidentiary hearing and simultaneously entered an order overruling the motions for postconviction relief and vacation of sentences. After obtaining court-appointed counsel, defendant perfected this appeal. He now asserts that the district court erred in (1) refusing to grant an evidentiary hearing; (2) failing to appoint counsel to represent defendant for his motion to vacate sentences and convictions; (3) finding that defendant was not denied effective assistance of counsel; and (4) failing to retroactively apply *Cage v. Louisiana*, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), with regard to the reasonable doubt jury instruction. On this appeal, defendant also argues, for the first time, the failure of previous counsel to disclose a conflict of interest in representing defendant and in failing to submit evidence in support of the pretrial motion for change of venue.

In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992).

Victor first argues that he was entitled to an evidentiary hearing under § 29-3001 on the additional allegations raised in his motion to vacate sentences filed before the district court.

"An evidentiary hearing on a postconviction motion is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement

of the movant's rights under the Nebraska or federal Constitution." *Sanders*, 241 Neb. at 689, 490 N.W.2d at 214. See, also, *State v. Schneckloth*, 235 Neb. 853, 458 N.W.2d 185 (1990); *State v. Start*, 229 Neb. 575, 427 N.W.2d 800 (1988); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985).

Conversely, an evidentiary hearing on a motion for postconviction relief may properly be denied when the records and files of the case affirmatively establish that the defendant is not entitled to relief. *State v. Maeder*, 240 Neb. 955, 486 N.W.2d 193 (1992); *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991).

The bulk of assigned errors raised in defendant's motion for relief before the district court were previously raised on direct appeal and finally determined by this court in *Victor I*. The record discloses that trial and appellate counsel did raise and argue the legality of Victor's confession, the constitutionality of § 29-2523(1)(d), the receipt into evidence of the 1964 manslaughter confession at the sentencing hearing, the determination that the aggravating circumstance found in § 29-2523(1)(d) existed and the mitigating circumstance found in § 29-2523(2)(g) did not exist, and the contention that the sentences were disproportionate and excessive.

We have repeatedly held that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated on direct appeal. It is not the purpose of affording postconviction relief to permit the defendant endless appeals on matters already decided. See, *State v. Whitmore*, 238 Neb.

125, 469 N.W.2d 527 (1991); *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990). Defendant's only attempt to avoid the procedural bar of the previously raised issues is by asserting that he was denied effective assistance of counsel because trial and appellate counsel *improperly* raised these issues. However, defendant failed to advance, either in the motion before the district court or in the present appeal to this court, allegations of specific facts to support these bare conclusions. Since defendant failed to make a factual showing to indicate he was entitled to relief, the district court did not err in denying defendant an evidentiary hearing on these previously litigated issues.

Relying on the U.S. Supreme Court's decision in *Cage v. Louisiana*, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), defendant further argues that the jury instruction on reasonable doubt was unconstitutional in that it confused the jury and suggested a higher degree of doubt than is required under the 14th Amendment. Subsequent to defendant's trial and appeal, this court has had the opportunity to review the constitutionality of a jury instruction identical to the one challenged here. See *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). In *Morley*, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional by the U.S. Supreme Court in *Cage*. Therefore, whether or not trial and appellate counsel failed to object to or appeal the jury instruction and whether or not the district court should have provided Victor the opportunity to advance this claim in an evidentiary hearing are

now irrelevant, causing this assignment of error also to be without merit.

The majority of Victor's claims were raised and fully reviewable from the record on direct appeal. Defendant's contentions that counsel failed to disclose a conflict of interest and failed to submit evidence in support of the pretrial motion for change of venue were not raised before the district court and are accordingly irrelevant to the court's decision to deny an evidentiary hearing. Victor's assigned error addressing the reasonable doubt instruction was decided by our opinion in *State v. Morley, supra,* and is consequently without merit. Finding that Victor has failed to allege facts that would constitute a denial or violation of his constitutional rights causing the judgments and convictions against him to be void or voidable, we hold that the district court did not err in denying an evidentiary hearing on his postconviction motion.

In his motion for relief to the district court, defendant alleged that the Nebraska Supreme Court committed error on his direct appeal. Victor first argued that the reweighing process for aggravating and mitigating circumstances engaged in by the Nebraska Supreme Court was unconstitutional. Victor also argued that the Nebraska Supreme Court erroneously refused to consider his inability to conform his conduct to law because of mental defect or intoxication. Defendant does not now further argue or advance these previously assigned errors except, perhaps, as they arise under the alleged errors of the district court in denying an evidentiary hearing and court-appointed counsel. In the absence of a factual allegation, an initial demonstration of an extraordinary and

relevant novel argument, or a reference to binding precedent not appearing in the record on direct appeal, errors of a state appellate court that are assigned for review before a state trial court in a motion for postconviction relief are without merit. Consequently, it was proper for the district court to address these errors without providing an evidentiary hearing and without appointing counsel.

> When the defendant in a postconviction proceeding alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
>
> *State v. Carter,* 241 Neb. 645, 650, 489 N.W.2d 846, 852 (1992). A defendant who asserts a claim of ineffective assistance of counsel and who seeks reversal of his convictions " ' "must show that (1) counsel's performance was deficient and (2) such deficient performance prejudiced the defense, that is, a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." . . . ' " *State v. Lyman,* 241 Neb. 911, 915, 492 N.W.2d 16, 19 (1992).

Defendant asserts that previous counsel failed to disclose a conflict of interest in the representation of defendant at both the trial and appellate level and in allegedly assisting defendant in drafting the petition for postconviction relief. Defendant also claims that trial counsel

failed to submit evidence in support of the pretrial motion for change of venue.

These issues were not raised in the motion for postconviction relief filed with the district court, nor were they specifically assigned as error in defendant's brief. "Absent plain error, where an issue is raised for the first time in this court, it will be disregarded inasmuch as the court whose judgment is being reviewed cannot commit error regarding an issue never presented and submitted for disposition." *State v. Whitmore,* 238 Neb. 125, 132, 469 N.W.2d 527, 532 (1991). Additionally, when a claim of ineffective assistance of counsel has not been raised or ruled on by the trial court *and* necessitates an evidentiary hearing, the matter will not be addressed on appeal. *State v. Morley,* 239 Neb. 141, 474 N.W.2d 660 (1991).

Considering that the allegation of an undisclosed conflict of interest was not raised or ruled on by the trial court and recognizing that there is not a record to review, we will not address the matter. Nor are we able to review the claim that trial counsel failed to submit evidence in support of the pretrial motion for change of venue. The only reviewable record about trial counsel's efforts to seek a change of venue is an inexplicit three-line notation on the criminal docket sheet. This notation merely references that a hearing was held on defendant's motion for a change of venue and that the motion was overruled after "evidence" was presented. Therefore, the ineffective assistance of counsel claim based on these two newly alleged grounds is not properly before this court.

As previously determined in the evidentiary hearing analysis, the failure of counsel to object to or appeal the

reasonable doubt jury instruction is now moot in light of our decision in *State v. Morley, supra.* The claims advanced by defendant regarding whether trial and appellate counsel failed to raise, or improperly raised, issues numbered (2), (3), (4), (5), (6), and (7) in the motion filed by defendant before the district court are also without merit. Defendant failed to advance, either in the motion before the district court or in the present appeal to this court, allegations of specific facts to support a conclusion that appellate counsel improperly raised the six constitutional issues challenged here. Defendant has failed to demonstrate how counsel's performance in raising the constitutional issues on direct appeal was deficient, and defendant has not attempted to advance a theory to show how this unknown deficiency prejudiced the defense.

In sum, defendant's assertion that he was denied effective assistance of counsel for various failures by trial and appellate counsel is without merit based on the record before us.

Victor alleges that in light of his undisputed indigency, the district court erred in failing to provide him court-appointed counsel. Under § 29-3004 (Cum. Supp. 1992), a district court may appoint an attorney to represent a prisoner in all postconviction proceedings under §§ 29-3001 through 29-3004. This power is within the discretion of the district court, and failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Wiley,* 228 Neb. 608, 423 N.W.2d 477 (1988).

Neither the Eighth Amendment nor the Due Process Clause of the federal Constitution requires states to

appoint counsel for indigent death row inmates seeking state postconviction relief. See *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991) (citing *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989)), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2279, 115 L. Ed. 2d 965. See, also, *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).

Victor contends, however, that since he was represented at both the initial trial and direct appeal by the same attorney, his motion for postconviction relief was his " 'first appeal as of right' " to raise an ineffective assistance of counsel claim. Brief for appellant at 23. Defendant relies on a criminal defendant's constitutional right to appointed counsel established by the U.S. Supreme Court in *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). In *Douglas*, the U.S. Supreme Court stated that "where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis omitted.) 372 U.S. at 357. By postulating that the postconviction proceeding provided him was his one and only appeal as of right to allege ineffective assistance of counsel, Victor maintains that it was error for the district court to deny him appointed counsel to assist him in advancing these claims.

Defendant further relies on the U.S. Supreme Court's decision in *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), *reh'g denied* ___ U.S. ___, 112 S. Ct. 27, 115 L. Ed. 2d 1109, to argue that the district court was constitutionally required to provide him with

appointed counsel for his postconviction motion. In *Coleman*, the issue pertinent to this review was whether ineffectiveness of counsel on appeal from the state habeas trial court judgment was an independent constitutional violation to constitute cause for federal habeas relief. Noting that the prisoner could only prevail if he were constitutionally entitled to appointed counsel in state postconviction proceedings, the U.S. Supreme Court reiterated the general rule that there is no right to counsel in state collateral proceedings. The Court queried whether there should be an exception to this general rule for those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. The Court declined to answer the question, however, in light of the fact that effectiveness of counsel before the state habeas *trial* court was not at issue. Any language in the *Coleman* opinion suggesting that a state trial court collateral proceeding may be considered a prisoner's "one and only appeal" was merely a passing inquiry and provides little insight or authority to defendant's argument here. 111 S. Ct. at 2568.

The U.S. Supreme Court has consistently recognized that the states have no obligation to provide postconviction relief proceedings and that when states do so provide, due process does not require that the states supply lawyers as well. See *Pennsylvania v. Finley, supra.*

Under Nebraska case law, where the record shows that a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel. *State v. Wiley*,

supra. Here, however, the assigned errors in the postconviction petition before the district court were either procedurally barred or without merit, establishing that this postconviction action contains no justiciable issue of law or fact. We therefore find that it was not an abuse of discretion for the district court to deny court-appointed counsel.

Finding no merit in the assignments of error properly before this court, we affirm the decision of the district court in its entirety.

AFFIRMED.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
OFFICE OF THE CLERK
P.O. BOX 98910
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

March 10, 1993

J. Joseph McQuillan
WALENTINE O'TOOLE LAW FIRM
11301 Davenport Street
Omaha, NE 68154

IN CASE OF: S-91-0933, State v. Clarence Victor

Appellant/Motion for Rehearing & Brf **filed** 02/08/93 **has been reviewed by the court and the following order entered:** Motion of appellant for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

No. 92-8894

Clarence Victor,

Petitioner

v.

Nebraska

ORDER ALLOWING CERTIORARI.

Filed September 28, 1993.

The petition herein for a writ of certiorari to the Supreme Court of Nebraska is granted limited to Question 3 presented by the petition. The case is consolidated with No. 92-9049, *Sandoval v. California*, and a total of ninety minutes is allotted for oral argument. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does not apply.

September 28, 1993

Supreme Court, U.S.
FILED
NOV - 9 1993
OFFICE OF THE CLERK

No. 92-8894

In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

NEBRASKA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Nebraska

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Did the Nebraska Supreme Court err in failing to apply the constitutional principles of *Cage v. Louisiana* to the Petitioner's case?

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OPINIONS BELOW

The Nebraska Supreme Court opinion, holding that the instruction given the jury on reasonable doubt was not constitutionally deficient under *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) is reported at *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993). The Nebraska Supreme Court denied petitioner's request for rehearing. (J.A. 43).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257, Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

The Nebraska Supreme Court denied Petitioner's motion for post-conviction relief on January 19, 1993. (J.A. 29). A timely petition for rehearing was denied on February 8, 1993. (J.A. 43). The petition for certiorari to this Court was filed June 1, 1993, and was granted September 28, 1993. (J.A. 44).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law;

> nor deny to any person within its jurisdiction the equal protection of the laws.

Nebraska Revised Statute 28-303 reads today, in pertinent part, as it did at the time of Petitioner's trial:

> A person commits murder in the first degree if he kills another person (1) purposefully and with deliberate and premeditated malice . . .

NEB. REV. STAT. §28-303 (Reissue 1989).

Nebraska Revised Statute 28-304 reads today, in pertinent part, as it did at the time of Petitioner's trial:

> (1) A person commits a murder in the second degree if he causes the death of a person intentionally, but without premeditation.

NEB. REV. STAT. §28-304 (Reissue 1989).

Nebraska Revised Statute 28-305 reads today, in pertinent part, as it did at the time of Petitioner's trial:

> (1) A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another while in the commission of an unlawful act.

NEB. REV. STAT. §28-305 (Reissue 1989).

STATEMENT OF THE CASE

The question before the Court is whether the Nebraska Supreme Court improperly failed to apply *Cage v. Louisiana*, 498 U.S. 39 (1990), to the facts of Petitioner's case. Because Petitioner relied upon his constitutional right to have a jury determine issues of fact and guilt, the error here cannot be found harmless under any set of circumstances. *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993).

A. Course of Proceedings and Disposition Below

Petitioner Clarence Victor was convicted of First Degree Murder and sentenced to death. Petitioner's conviction and sentence were affirmed by the Nebraska Supreme Court. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990). Rehearing was denied on March 10, 1993. (J.A. 43).

Thereafter, Petitioner filed his Petition for Writ of Certiorari with this Court on November 16, 1990. Petitioner filed a Supplement to his Petition with this Court on January 15, 1991 specifically addressing this Court's decision in *Cage v. Louisiana*, 498 U.S. 39 (1990). *Cage* was decided on November 13, 1990. Petitioner's petition was denied on February 25, 1991. *Victor v. Nebraska*, 498 U.S. 1127 (1991).

Victor's initial Habeas Corpus action under the Nebraska Post Conviction Act raised the *Cage* issue anew. (J.A. 20). The trial court at this point improperly injected retroactivity into the case, and on that basis denied Petitioner's request for relief. (J.A. 26). The Nebraska Supreme Court affirmed on other grounds, holding its prior decision in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), was dispositive on the basis that NJI 14.08, (the instruction given in both cases), was distinguishable from the instruction held invalid under *Cage*. *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993); (J.A. 29).

B. The Trial Facts

At approximately 6:00 p.m. on Saturday, December 26, 1987, Omaha Police were dispatched to 2125 Ohio Street. (Tr. Vol. II 24). Upon arrival, the police officers entered the residence and found the deceased, Alyce

Singleton, lying on the floor in the kitchen area. (Tr. Vol. II 28) The deceased had lacerations to the neck among other injuries, and it was later determined that these lacerations were the major contributing factor to her death. (Tr. Vol. II 31).

In the canvas of the neighborhood, police learned from a neighbor that an older model cream-colored four-door automobile was parked west of Mrs. Singleton's residence at approximately 5:00 p.m. on December 26, 1987. (Tr. Vol. III 200). A black male described only as between the ages of 30 and 40, wearing sunglasses and a hat, was observed seated behind the steering wheel of the car. (Tr. Vol. I 6).

The police investigation revealed that an individual named Clarence Victor had previously done gardening work for the deceased. (Tr. Vol. II 113).

Victor was brought to the Omaha Police Station and was questioned about his whereabouts on December 26, 1987, the date of the homicide. Victor was not advised of his *Miranda* rights nor was he informed in any fashion that he was or was not under arrest. (Tr. Vol. III 243).

Victor was questioned by Officers Conahan and Foxall concerning the death of Mrs. Singleton and Victor initially gave them an exculpatory statement indicating that he had not been near the residence of the deceased on that date. (Tr. Vol. III 212).

After further investigation and advisement of his *Miranda* rights, Mr. Victor agreed to give a taped statement concerning his involvement with the homicide of Mrs. Singleton. At the trial, his taped statement was marked as Exhibit 28 and received into evidence over Victor's objection. (Tr. Vol. III 235).

In the taped statement, Victor acknowledged that he went to Mrs. Singleton's home on December 26, 1987, and knocked on the door. After opening the door, an argument ensued between the parties. Singleton began to scream at Victor and began to swing her hand and scratched Victor. Victor stated he struck her with his hand and knocked her down and then struck her in the head with a pipe. Victor stated that Mrs. Singleton, while on the ground, became tangled in some type of cord and he used his pocket knife to cut the cord loose from her throat. Victor indicated that at that point he left Mrs. Singleton's residence and returned home. (Tr. Vol. III 231-34); (Tr. Vol. VI Ex. 28).

When asked by Officer Foxall why he killed Mrs. Singleton, Victor responded that he drank too much. (Tr. Vol. III 252); (Tr. Vol. VI Ex. 28).

At trial, Dr. Blain Roffman, a pathologist, testified that he performed an autopsy on the body of Alyce Singleton. Dr. Roffman opined that the head injuries were caused by blunt trauma. He would only estimate that the trauma was caused by several blows to the head. (Tr. Vol. II 76). Finally, the cause of death was determined to have been caused by a "nick" of a branch of the left carotid artery with subsequent hemorrhaging. (Tr. Vol. II 78-81).

C. The Jury Argument

The most significant issue raised by defense counsel at trial was the existence, or lack thereof, of intent: purposefulness, deliberation, premeditation, and malice as required for conviction on the charge of first degree murder for the death of Alyce Singleton.

After summarizing the State's evidence, defense counsel argued at the conclusion of his opening statement

that the state would not be able to sustain its burden of proof concerning first degree murder.

> And from that in effect you will be asked to conclude beyond a reasonable doubt that the defendant premeditated the act and deliberated upon it before committing it.
>
> * * *
>
> What is important for you, as you all swore to do, is to listen to the evidence and not fill in the blanks, not lessen the burden of proof, and well and truly try the case.
>
> And I submit to you that the State, if you view this with an open mind and a clear conscience, will fall woefully short of proving to you beyond a reasonable doubt first degree murder in this case.

(Tr. Vol. II 21-22).

Clarence Victor did not testify. As defense counsel indicated at the outset of the trial, the thrust of his case would be the inability of the State to prove "sufficient criminal intent for first degree murder." (Tr. Vol. II 15-16). This failure, defense counsel argued, would make the difference between proof of first or second degree murder or manslaughter. The difference between life or death.

There was reasonable doubt concerning the existence of the intent required for first degree murder: purposefulness, deliberation, premeditation and malice.

Victor had on two occasions given exculpatory statements to police officers and had indicated that he had been home between the hours of 4:00 and 6:00, the approximate time of the murder. (Tr. Vol. III 212).

Mr. Victor's brother-in-law testified that to his recollection Victor was not home during this period of time, but that he returned home shortly thereafter, was

extremely upset, and indicated that someone had killed Mrs. Singleton. (Tr. Vol. II 157). Walker also described Victor's drinking habits as being drunk on an average of once to twice a week. (Tr. Vol. II 163). Walker testified that Victor was drunk on Christmas day, the day before the murder, and further testified that his wife had become involved in an argument with Victor regarding his drinking habits. (Tr. Vol. II 164). It was this argument that led Walker to inform Victor that he was no longer welcome at the home of Walker and his wife and would have to move out. Victor was in the process of moving out that same day, the day of the murder. (Tr. Vol. II 165).

Victor's former girlfriend, Adelle Doyle, testified that on the morning of the murder Victor had stopped by her home and that she could tell Victor had already consumed "a couple of beers." (Tr. Vol. III 182). She also indicated that Victor probably had something to drink while he was at her house. (Tr. Vol. III 191-92). Doyle testified that on that same day, Victor called her "later that evening", was "hysterical" and after Doyle had told Victor to calm down, Victor informed Doyle that "Mr. Voyal's sister [Alyce Singleton] had been killed." (Tr. Vol. III 186).

Pitmon Foxall, one of the chief officers involved in the Singleton homicide investigation, testified that Victor had indicated to him that on the morning of the murder Victor had picked up his girlfriend at a bar, went driving around, stopped at a grocery store to pick up beer and continued to drive around, consuming the beer. (Tr. Vol. III 211-12).

In closing arguments, defense counsel honed the issue even further.

> The issues in this case relate solely, realistically and only to the intent for the Defendant. And I use the term intent in its generally understood meaning not its legal terms. What we are talking about is what was going through defendant's mind. That's the issue because, folks, the difference between first, second and manslaughter is what was going through the mind of the perpetrator of the crime. You all agree that the State had the obligation to prove to you beyond a reasonable doubt the elements that are required before you would convict on any offense.

(Tr. Vol. III 294-95).

D. The Jury Instructions

Following the closing arguments, the court instructed the jury on first degree murder, second degree murder and manslaughter and the material elements of each crime. (J.A. 2). The jury was admonished that if the State failed to prove beyond a reasonable doubt "any one or more" of the material elements of the respective crimes it was the jury's duty to find Victor not guilty of the particular crime. (J.A. 3-5).

The trial court gave the following instruction:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you after full, fair and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. You may be convinced of

> the truth of a fact beyond reasonable doubt and yet to be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

(J.A. 11).

The jury returned a verdict of guilty of Murder in the First Degree.

Pursuant to NEB. REV. STAT. §29-2520 (Reissue 1985), a sentencing hearing was held before a three judge panel on August 26, 1988. The Sentencing Panel sentenced Victor to death.

Victor appealed his conviction and sentence to the Nebraska Supreme Court. That court affirmed both the conviction and the sentence. *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990).

E. Victor's Post-Conviction Appeal

Victor filed a Motion for Post-Conviction Relief with the Douglas County District Court pursuant to NEB. REV. STAT. §29-3001 (et seq.) (Reissue 1989). The Motion was filed on May 10, 1991. (J.A. 20).

Petitioner's motion was his first habeas corpus proceeding at the trial level under the Nebraska Post-Conviction Act (NEB. REV. STAT. §29-3001, et seq.). Specifically, the relevant issue raised was as follows:

> 4. The Defendant was denied due process of law in violation of the Fifth and Fourteenth Amendment [sic] of the U.S. Constitution and Art. I Sec. 3 of the Nebraska Constitution in that the trial court improperly instructed the jury on the law with regard to the concept of "Reasonable Doubt."

(J.A. 21)

After quoting the challenged instruction, the Motion went on to argue:

> This instruction is taken from NJI 14.08. The United States Supreme Court has recently held that a similar instruction violates due process of law. See *Cage v. Louisiana* 48 CrL 3062, ___ U.S. ___, ___ Spr. Ct. ___ (1990) [sic].
>
> Since the primary defense asserted at trial by Defendant was that the state had insufficient evidence to prove the elements of premeditation and deliberation beyond a reasonable doubt, the Defendant was prejudiced by the courts [sic] instruction to the jury of this constitutionally infirm definition of reasonable doubt.

(J.A. 21-22).

The trial court denied relief, holding as follows:

> Defendant contends that his constitutional rights were violated in that the Court utilized the instruction on reasonable doubt that is provided in NJI 14.08, which has been extensively utilized and has been approved by the Nebraska Supreme Court. Defendant contends that in *Cage v. Louisiana*, 498 U.S. ___, 111 S.Ct. 328, 112 L.Ed. 2d 339 (1990), the Court held that such an instruction violates due process of law. The decision in *Cage* was rendered after defendant's conviction and affirmance of such conviction on appeal to the Nebraska Supreme Court. *Cage* does not indicate if its effect is retroactive. The

> Court determines that it should not be applied retroactively. *See Kernes v. Grammer*, 227 Neb. 165, 416 N.W.2d 253 (1987); *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984); *Teague v. Lane*, 489 U.S. 288.
>
> * * *
>
> IT IS FURTHER ORDERED that defendant's motion to vacate sentence and conviction be and the same is hereby overruled.

(J.A. 26, 28).

Petitioner appealed the above decision to the Nebraska Supreme Court on November 3, 1991 and included the *Cage* issue as claimed error. The Nebraska Supreme Court held as follows:

> Relying on the U.S. Supreme Court's decision in *Cage v. Louisiana*, ___ U.S. ___, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), defendant further argues that the jury instruction on reasonable doubt was unconstitutional in that it confused the jury and suggested a higher degree of doubt than is required under the 14th Amendment. Subsequent to Defendant's trial and appeal, this court has had the opportunity to review the constitutionality of a jury instruction identical to the one challenged here. See *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). In *Morley*, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional the U.S. Supreme Court in *Cage*.
>
> * * *
>
> . . . Victor's assigned error addressing the reasonable doubt instruction was decided by our opinion in *State v. Morley, supra*, and is consequently without merit.

(J.A. 35-36); *State v. Victor*, 242 Neb. 306, 494 N.W.2d 565 (1993).

Following the Nebraska Supreme Court's affirmance on January 29, 1993 of the District Court's order, Victor thereafter timely filed his Motion for Rehearing on February 8, 1993. On March 10, 1993, the Nebraska Supreme Court overruled the Motion. (J.A. 43).

Victor filed his Petition for Writ of Certiorari to this Court on June 1, 1993. On September 28, 1993 this Court granted the Writ of Certiorari with respect to question III, "Whether the Nebraska Supreme Court erred in failing to reverse the trial court's refusal to retroactively apply *Cage v. Louisiana*."

This case is consolidated with No. 92-9049, *Sandoval v. California*.

SUMMARY OF ARGUMENT

As noted by the Court most recently in *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993), a jury instruction that misdescribes the states burden of proof cannot be subject to a harmless error analysis. This Court has long since recognized the State's burden in all criminal prosecutions to prove every element of the offense charged "beyond a reasonable doubt". *In Re Winship*, 397 U.S. 358 (1970).

In the present action, factual guilt is not in question. It was conceded by defense counsel at trial in closing argument. However, the issue of whether or not Clarence Victor possessed the requisite criminal elements of intent for first degree murder: purpose, premeditation, deliberation and malice, was not conceded. Indeed the focal point of the entire trial before the jury was whether Clarence Victor had the requisite criminal intent-premeditation,

malice, deliberation, beyond a reasonable doubt, to convict him on a charge of first degree murder.

The absence of the factual guilt as an issue at trial in no measure lessened the State's burden of proof. The jury, not the trial court or the State, was charged with the task of determining Victor's guilt of the three offenses for which the court instructed them, first degree murder, second degree murder or manslaughter.

As noted by this Court recently, the ultimate measure of whether or not the jury's fact-finding standards pass constitutional scrutiny cannot be the subject of judicial factfinding, and certainly not under a harmless error analysis. *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993).

Where, as in Sullivan and the present action, a reasonable doubt instruction contains defects which create a "reasonable likelihood" that the jury will misapply the State's burden of proof, a jury is precluded from fulfilling its truth-finding task on the standard of proof beyond a reasonable doubt. *Boyde v. California*, 494 U.S. 370 (1990).

The unwillingness of the Nebraska Supreme Court to recognize this Court's admonitions concerning the structural defects of a nearly identical reasonable doubt instruction requires this Court to revisit *Cage v. Louisiana*, 498 U.S. 39 (1990) and *Sullivan, supra*. But the problem with the Nebraska high court is a more fundamental one. The opinion by the Nebraska Supreme Court on the relevant issue for which Certiorari was granted did not focus its attention to a harmless error analysis of the jury's fact-finding abilities in light of Cage. Rather, the court focused its attention upon its own prior decision in *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991).

The United States District Court for the District of Nebraska has since held what this Court already knows:

such a position is untenable. *Morley v. Stenberg*, 828 F.Supp. 1413 (D.Neb. 1993). The local federal court recognized the same defect found by this Court to exist in Cage and *Sullivan*:

> I therefore conclude that, in attempting to define the concept of reasonable doubt, the challenged instruction so misstated the degree of certainty required to convict, and the degree of doubt required to acquit, that it is reasonably likely the jury applied the instruction in a way that violated the constitution by lowering the government's burden of proof.

Morley v. Stenberg, 828 F.Supp. 1413, 1425 (1993). The instruction at issue in *Morley, supra*, is identical to the instruction given at Petitioner's trial.

The difficulties of the Nebraska instruction are at least threefold. First of all equating "actual and substantial doubt" with reasonable doubt unconstitutionally overstates the degree of doubt required for acquittal. *Morley v. Stenberg*, at 1418.

Secondly, the usage of the term "strong probabilities of the case" implies the allowance of a finding of guilt upon something more closely akin to the civil "preponderance of the evidence" standard, thus relieving the jury of the constitutionally essential beyond a reasonable doubt standard of proof. *See Francis v. Franklin*, 471 U.S. 307 (1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979).

Finally, and as recognized by *Cage*, usage of the term "moral certainty" in a reasonable doubt instruction and equating that term with "reasonable doubt", allows the jury to find guilt on feeling or convictions in spite of, or worse, independent of the evidence presented. *Cage v. Louisiana, supra*, at 41.

Cage, Sullivan, Boyde and *Francis* tell us that the reasonable doubt instruction utilized at Petitioner's trial is unconstitutionally defective. *Sullivan* tells us that an unconstitutionally defective reasonable doubt instruction is that type of structural defect that renders a trial in which it was given so deficient in its guarantee of due process to a criminal defendant that it cannot be considered harmless error under any set of circumstances.

Petitioner asks the Court to remand this matter for a new trial consistent with its opinion in *Sullivan v. Louisiana*.

ARGUMENT

The Sixth Amendment to the United States Constitution provides every criminal defendant with a right to a trial by a jury of his peers. Intertwined with this Sixth Amendment right to a trial by jury are the Fifth and Fourteenth Amendment rights to due process of law. This Court in the case of *In Re Winship*, 397 U.S. 358 (1970) held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. When a jury instruction allows a jury to convict a person on proof of guilt that is less than a reasonable doubt, that person has not received due process of law. In Clarence Victor's case, a conviction on a constitutionally deficient jury instruction condemned him to death without being afforded due process.

This Court held in *Cage v. Louisiana*, 498 U.S. 39 (1990), that a Louisiana reasonable doubt instruction violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by allowing

conviction in a criminal case on proof that could potentially fall below the beyond a reasonable doubt standard. The instruction at issue in the Petitioner's case is as constitutionally defective, if not more constitutionally defective, as the instruction in *Cage* and constitutes plain error.

In *Cage* this Court declared invalid on Due Process grounds a jury instruction defining reasonable doubt as follows:

> "one founded upon a real tangible and substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty."*

State v. Cage, 554 So.2d 39, 41 (La. 1989) (emphasis added).

In Clarence Victor's case, the Nebraska trial court instructed the jury using Nebraska Jury Instruction 14.08 which defined reasonable doubt as follows:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair and impartial consideration of all the evidence, to have an abiding conviction, to a *moral certainty,* of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be

> convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. *You may find an accused guilty upon the strong probabilities of the case,* provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. *A reasonable doubt is an actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

(J.A. 11); (Emphasis added).

A comparison of the instruction declared unconstitutional in *Cage* and the instruction given in Victor's case reveals that both jury instructions are unconstitutional as they are both susceptible to interpretation as requiring a level of proof less than beyond a reasonable doubt in order to find the criminal defendant guilty.

Petitioner therefore respectfully requests that this court vacate his sentence and remand the case for a new trial.

I. THE JURY INSTRUCTION IN THIS CASE IS UNCONSTITUTIONAL UNDER ANY STANDARD OF REVIEW.

The proper standard used in deciding whether or not a jury instruction is defective is the "reasonable likelihood" standard as developed and defined by this Court in *Boyde v. California,* 494 U.S. 370 (1990). The standard is whether there is a "reasonable likelihood" that the jury applied the challenged instruction in a way that violated Petitioner's constitutional rights. This standard was reaffirmed in *Estelle v. McGuire,* 112 S.Ct. 475, 482 n.4 (1991)

where this Court denounced the *Cage* "how the jurors could have understood the charge as a whole" standard, and with one voice proclaimed that the "reasonable likelihood" standard is the correct standard to be used when reviewing jury instructions.

Accordingly, applying *Boyde,* the language used in instructing the jury on the concept of reasonable doubt in the Petitioner's case rises to the level of creating a "reasonable likelihood" that they could find guilt based upon something less than beyond a reasonable doubt.[1]

However, the language of the jury instruction in this case is so clearly flawed and so close to that in *Cage* that it fails under any standard of review. Therefore there is no need here to revisit this issue, or to further refine the application of the review standard adopted by the Court in Estelle in this different constitutional context.

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[1] In the case of *Francis v. Franklin,* 471 U.S. 307 (1985), this Court held that the correct analysis for determining the constitutionality of a challenged jury instruction was, how "a reasonable juror could have interpreted the instruction." *Id.* at 1971 (citing *Sandstrom v. Montana,* 442 U.S. 510, 514 (1979)). There is a school of thought within the legal community that believes the *Franklin/Sandstrom* standard of review for jury instructions still exists, even in light of this Court's opinion in *Estelle v. McGuire.* It is worth noting that the reasonable doubt instruction given in the case at bar is also violative of Petitioner's constitutional rights under that standard.

II. THE REASONABLE DOUBT INSTRUCTION USED IN THE PETITIONER'S CASE VIOLATED DUE PROCESS BY ALLOWING CONVICTION ON A STANDARD OF LESS THAN A REASONABLE DOUBT.

This Court made it clear in *In Re Winship* that a criminal defendant must be found guilty beyond a reasonable doubt to be convicted of a crime.

> No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charge.

Winship, 397 U.S. at 363. The jury instruction in the Petitioner's case creates a reasonable likelihood that the jury found Petitioner guilty of first degree murder by employing a standard below that of "beyond a reasonable doubt."

A. "Actual & Substantial Doubt"

Like the jury instruction found unconstitutional by this Court in *Cage,* the instruction in the Petitioner's case equates reasonable doubt with "actual and substantial doubt." The commonly understood meaning of the term "substantial" suggests a degree of doubt necessary to acquit that is higher than the degree of doubt required under the reasonable doubt standard. *Cage,* 498 U.S. at 41. There is certainly a reasonable likelihood that an ordinary jury attempting to apply the correct reasonable doubt standard applied the common meaning of the term "substantial." The instruction therefore violated Petitioner's

due process rights in allowing conviction for first degree murder on proof less than beyond a reasonable doubt.

Several Federal courts prior to the decision in *Cage* had found the usage of the "substantial doubt" language problematic, some going so far as to state that the usage of such language should result in reversal of the decision of the trial court. *See Monk v. Zelez*, 901 F.2d 885, 889 (10th Cir. 1990) (granting habeas relief where jury instruction defined reasonable doubt as "substantial, honest, conscientious doubt," noting that appellate courts "have uniformly criticized and rejected jury instructions equating reasonable doubt with substantial doubt"); *United States v. Wright*, 542 F.2d 975, 988 (7th Cir. 1976) (warning that any court using substantial doubt language in a jury instruction "can reasonably expect a reversal"), cert. denied, 429 U.S. 1073 (1977), overruled on other grounds, *United States v. Hollinger*, 553 F.2d 535 (7th Cir. 1977); *United States v. Atkins*, 487 F.2d. at 260 (concluding "substantial doubt" is not synonymous with "reasonable doubt" and disapproving of instructions relating the two); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1972) (granting a new trial where the jury instruction defined reasonable doubt as "a very substantial doubt").

Since the *Cage* decision, at least two Federal Courts have found that the usage of the terminology "actual and substantial doubt" in the context of a reasonable doubt instruction is violative of due process under *Cage*. The Fourth Circuit Court of Appeals in *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992), found a jury instruction equating reasonable doubt with "substantial doubt" to be violative of due process under *Cage*. More recently, the United States District Court for the District of Nebraska, found the jury instruction given in Nebraska utilizing

"actual and substantial doubt" language to define reasonable doubt, the same instruction given in Petitioner's case, to be violative of an accused's due process rights under *Cage*. *Morley v. Stenberg*, 828 F.Supp. 1413 (D.Neb. 1993).

> [E]quating reasonable doubt with "actual and substantial" doubt is improper and potentially misleading in that it overstates the degree of doubt required for acquittal under the reasonable doubt standard.

Morley v. Stenberg, 828 F.Supp. at 1418.

Perhaps the best illustration of the divergence in meaning between "actual and substantial" doubt and reasonable doubt comes from an Eighth Circuit case disapproving of "substantial doubt" language. In *United States v. Atkins*, 487 F.2d 257, 260 n.2 (8th Cir. 1973), it was pointed out at oral argument that if someone had to undergo major surgery and were asking the doctor's opinion as to the prospects for a successful outcome, the person would feel quite differently if the doctor told him there was only a reasonable chance of success as opposed to being told there was a substantial chance of success. *Atkins* at 260 n.2 (quoting *State v. Davis*, 482 S.W.2d 486, 490 (Mo. 1972)).

Clearly the common understanding of the meaning of "substantial" is different than the understood meaning of "reasonable." "Substantial doubt" so overstates the degree of doubt required by *In Re Winship* that Petitioner's due process rights were violated when the jury was instructed in a manner suggesting the terms were synonymous.

B. "Strong Probabilities"

The jury instruction given in Clarence Victor's case allowing the jury to find the Petitioner guilty of first degree murder on the "strong probabilities of the case" allows a finding of guilt on a standard of proof well below that of beyond a reasonable doubt. Although this language does not appear in the *Cage* instruction, the language suffers from the same constitutional infirmities. *See Morley v. Stenberg*, 828 F.Supp. at 1421-22.

Cage requires that when determining whether a jury instruction accurately sets forth the proper standard of proof, terms are to be given their common meaning. *Cage* at 41. The common meaning of the term "probabilities" more accurately describes the civil "preponderance of the evidence" standard than it does the criminal "beyond a reasonable doubt" standard.

Webster's Ninth New Collegiate Dictionary (1983) defines the word probability as being, "[t]he quality of being probable." The definition of probable reads, "supported by evidence strong enough to establish presumption *but not proof.*" (Emphasis added). Accepting a common dictionary definition to accurately portray the general public's understanding of the term, this phrase cannot be said to accurately define the reasonable doubt standard.

In Re Winship requires a conviction in a criminal case to be based upon proof beyond a reasonable doubt of the defendant's guilt. Nowhere has this Court or any other court accepted a proposition allowing conviction in a criminal case on the prosecution's creation of a presumption of guilt rather than proof of guilt. Rather in our accusatorial system of justice a person is presumed innocent until proven guilty. However, in instructing the jury

that they may find a defendant guilty upon the "strong probabilities" of the case, the trial court in effect advocates conviction upon the prosecution's creation of a presumption of guilt on the part of the defendant. The State used this crutch in Victor's trial to get to a conviction on first degree murder charge. This unconstitutionally relieves the State's burden of proof of every material element of a charge by allowing a conviction on proof by something less than beyond a reasonable doubt. *See Francis v. Franklin*, 471 U.S. 307, 314 (1985) (citing *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979)).

Black's Law Dictionary, 5th ed. (1979) provides a similar definition of the word "probability", further demonstrating the deficiencies inherent in using the terminology to define the reasonable doubt standard. Black's defines "probability" as,

> Likelihood; appearance of reality or truth; reasonable ground of presumption; verisimilitude; The likelihood of a proposition or hypothesis being true, from its conformity to reason or experience, or from superior evidence or arguments adduced in its favor. A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

This definition of "probability" purported to be accepted by the legal community similarly does not accurately reflect proper language defining the reasonable doubt standard. In fact, the language more accurately describes the "preponderance of the evidence" standard used in civil cases. Preponderance of the evidence is defined by Black's as,

> Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is evidence which as a

> whole shows that the fact sought to be proved is more probable than not.

Black's Law Dictionary, 5th ed. (1979) (citing *Braud v. Kinchen*, 310 So.2d 657 (La. 1st Cir. 1975)). *In Re Winship* clearly states this is not the proper standard for a finding of guilt in a criminal case.

Further evidence of the inadequacies of the "strong probabilities" language may be found by looking to some of the synonyms for the term "probable" as suggested in Webster's Collegiate Thesaurus (1976): "conceivable," "likely," "possible," "believable," "colorable," "credible" and "plausible." This language clearly does not reflect the standard of proof in a criminal case held out as fundamental in the American justice system. In our system a criminal is not to be convicted and sentenced to death because he is conceivably guilty, possibly guilty, or plausibly guilty. He is either guilty beyond a reasonable doubt or he is not guilty at all.

The addition by the Court of the word "strong" as a modifier of the term "probabilities" does not save the language from suggesting a degree of certainty lower than that required by due process. A strong probability is at most something more than a probability[2] – something still far short of what is constitutionally required to establish criminal guilt. Such an instruction simply does not properly impress upon the jury the "necessity of reaching a subjective state of certitude of the facts in issue." *Winship* at 364.

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[2] Cf. *Maynard v. Cartwright*, 486 U.S. 356, 364 (1987)("especially heinous merely suggests that the individual jurors should determine that the murder is more than just 'heinous,' whatever that means. . . . ")

It is "reasonably likely" that the jury would understand the phrase as allowing the finding of guilt relating to the charge of first degree murder on proof that is less than beyond a reasonable doubt. Under the *Estelle v. McGuire* and *Boyde v. California* standard, the reasonable likelihood of misinterpretation of the reasonable doubt instruction by the jury condemns the charge as violative of the Due Process Clause. *Cage v. Louisiana* at 41.

C. "Moral Certainty"[3]

In *Cage*, this court warned that it is improper to equate guilt beyond a reasonable doubt with "moral certainty" of guilt, because doing so allows jurors to find a defendant guilty based upon "moral certainty" rather than upon "evidentiary certainty." *Cage* at 41. Like the instruction in *Cage*, the Nebraska Courts improperly provided the jury with a definition of reasonable doubt equating beyond a reasonable doubt with "moral certainty."

The Nebraska Supreme Court attempted to artfully distinguish NJI 14.08 from the instruction given in *Cage*. The distinction offered by the Nebraska Supreme Court suggested that the *Cage* instruction required the juror to vote for conviction unless convinced to a moral certainty that there exists reasonable doubt, while the Nebraska instruction required a juror to vote for acquittal unless

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[3] The brief of the Petitioner in *Sandoval v. California*, 92-9049, with which this case is joined, provides a helpful survey of the history of the phrase "moral certainty" and the meaning given that phrase in modern American usage. Rather than repeat those arguments here, Petitioner respectfully refers the Court to them and incorporates them by this reference.

convinced to a moral certainty that no reasonable doubt exists. The United States District Court for the District of Nebraska found the distinction to be untenable in *Morley v. Stenberg*. Magistrate Piester noted his dissatisfaction with the Nebraska Supreme Court's analysis:

> I do not believe a reasonable juror reading the language of the challenged instruction would engage in the mental gymnastics required to interpret the instruction to mean they should acquit the defendant "unless convinced to a moral certainty that no reasonable doubt exists."

Morley v. Stenberg, 828 F. Supp. at 1421 n.10.

What is moral certainty? On it's face this charge suggests that the jurors should rely on their feelings about the crime rather than the evidence. When the defendant is alleged to have committed an especially repugnant crime a juror can reasonably believe the reasonable doubt instruction equating "moral certainty" with evidentiary certainty allowing a verdict to be based upon moral standards and considerations in addition to or instead of evidentiary standards.

Because the jury instruction in the Petitioner's case equates "moral certainty" with the requirement of finding guilt beyond a reasonable doubt, the use of the terminology is improper and creates a reasonable likelihood of misleading the jurors in their determinations of the defendant's guilt. *See Cage* at 41. *See also Lanigan v. Maloney*, 853 F.2d 40 (1st Cir. 1988) (affirming habeas relief where a jury instruction equated proof beyond a reasonable doubt with "moral certainty" and created a significant risk that jurors could find guilt based on a lower standard of proof than required by due process), cert. denied, 488 U.S. 1007 (1989); *United States v. Drake*, 673 F.2d 15, 20 (1st Cir. 1982) (strongly disapproving of jury

instructions using "moral certainty" to define proof beyond a reasonable doubt because the juries might feel justified in convicting on a feeling rather than on factual evidence).

III. UNDER *SULLIVAN v. LOUISIANA*, A JURY INSTRUCTION THAT DEFINES REASONABLE DOUBT IN A MANNER SUGGESTING A LOWER DEGREE OF PROOF NECESSARY TO CONVICT IS NOT HARMLESS ERROR.

As concluded by this Court in *Sullivan v. Louisiana*, 124 L.Ed.2d 182 (1993), a jury instruction that misdescribes the requisite burden of proof in a criminal case is not subject to harmless error analysis. The guarantee of a right to a jury verdict of guilt beyond a reasonable doubt is denied by an improper instruction and therefore that type of an error constitutes a structural defect in the trial mechanism that defies analysis by harmless error standards. *Sullivan v. Louisiana* at 190-191.

IV. THE NEBRASKA SUPREME COURT ERRED IN FAILING TO FOLLOW THE CONSTITUTIONAL PRINCIPLES OF *CAGE v. LOUISIANA* IN THIS CASE.

The State District Court below improperly injected the issue of retroactivity into this case. The Court noted:

> The decision in *Cage* was rendered after Defendant's conviction and affirmance of conviction on appeal to the Nebraska Supreme Court. *Cage* does not indicate if its effect is retroactive. The Court determines that it should not be applied retroactively.

However, this Court has made it clear that a case is final, for retroactivity purposes, when a petition for certiorari is

denied. *See Stringer v. Black*, 112 S.Ct. 1130, 1134 (1992); *Sawyer v. Smith*, 110 S.Ct. 2822, 2826 (1990). All constitutional rules, whether "new" or otherwise, apply equally to cases which have not reached that point at the time the rule is announced or applied by this Court in another case. *Griffith v. Kentucky*, 479 U.S. 314 (1987). The jurisprudential rule of *Griffith* – which reflects "basic norms of constitutional adjudication," *Id.* at 322, was not changed by, but ratified in, *Teague v. Lane*, 489 U.S. 288 (1989). *See Id.* at 304 (plurality opinion).

Since Petitioner's case was pending on certiorari when *Cage v. Louisiana* was decided, in fact the *Cage* issue was raised by counsel in a supplement to his pending certiorari petition, *Griffith* and *Teague* require that Petitioner's case be decided under the same constitutional principles as *Cage*. The Nebraska Supreme Court therefore erred in failing to follow *Cage* in this case.[4]

---

[4] Even if retroactivity were an issue in this case, under *Teague v. Lane*, 489 U.S. 288 (1989), *Cage* should be retroactively applied to the Petitioner's case. In Teague this Court set forth an exception to the general rule that new rules of constitutional criminal procedure will not be applicable to those cases which have become final before new rules are announced. This exception states that a new rule should be applied if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'." *Teague* at 311 (citing *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

> The concept of guilt beyond a reasonable doubt provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

In Re Winship at 363 (citing *Coffin v. United States*, 156 U.S. 432, 453 (1985)). Fundamental fairness in a criminal trial cannot be said to exist without the adherence to the standard of proof beyond a reasonable doubt. Therefore, under the above-noted exception to the general principle against retroactive application of new constitutional procedural rules, *Cage* should be applied retroactively when a proper case so requires. Even if retroactivity were a valid issue, the fundamental nature of the reasonable doubt instruction in the scheme of constitutional due process rights would require *Cage* to be applied to Petitioner's case.

CONCLUSION

In the American system of justice, fact-finding must be done pursuant to the only constitutionally acceptable standard for finding facts in criminal cases, the standard of proof beyond a reasonable doubt. *In Re Winship* at 362. Clarence Victor was denied his rights to due process of law when the judge issued a jury instruction using such dubious terms as "substantial doubt," "strong probabilities," and "moral certainty" to define the reasonable doubt standard, thereby creating a reasonable likelihood that the jurors in his trial applied the instruction as to find him guilty on the charge of first degree murder through a standard below that of beyond a reasonable doubt. The effect of such a constitutionally deficient reasonable doubt instruction in Clarence Victor's case was disastrous. Without it the State could not have obtained a guilty verdict on the first degree murder charge. And consequently Clarence Victor could not have been sentenced to death.

This error at the trial level is not subject to harmless error analysis. The standard of proof beyond a reasonable doubt is in keeping with the acknowledgement that "there is always in litigation a margin of error," and a determination that where life and liberty are at stake, the risks of error must be cast in a way that protects the

"transcending value that an accused has in his liberty." *In Re Winship* at 364.

Because the Petitioner was found guilty of first degree murder and sentenced to death on a finding of guilt based on a standard less than proof beyond a reasonable doubt, Petitioner was denied his constitutional right to due process of law, and in effect a trial by jury. Petitioner therefore asks that his rights be vindicated by vacating his sentence and ordering a new trial consistent with this Court's decisions in *Cage v. Louisiana* and *Sullivan v. Louisiana*.

Respectfully Submit'ed,

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In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nebraska

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Was the state district court correct in refusing to consider a *Cage* due process claim in a state postconviction proceeding when petitioner had defaulted the issue at trial and on direct appeal?

2. Can *Cage* be retroactively applied to any case, given that *Cage* did not employ a "reasonable likelihood" test in evaluating the jury instruction in question?

3. If this Court should now reject the use of long accepted terms such as "to a moral certainty" in a reasonable doubt jury instruction, based upon a "reasonable likelihood" test, should *Griffith* be modified to prevent extraordinary disruption in state criminal justice proceedings?

4. Was the Nebraska Supreme Court correct in declining to address the retroactivity of *Cage* on the basis that Nebraska's reasonable doubt jury instruction is, in any event, constitutional?

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RESPONDENT'S BRIEF

OPINION BELOW

As resolution of this case involves questions which could have been, but were not, presented in the direct appeal of this case, the Court should have reference to ***State v. Victor***, 235 Neb. 770, 457 N.W.2d 431 (1990), ***cert. denied*** 498 U.S. 1127 (1991) as well as the opinions cited by the Petitioner.

STATEMENT OF THE CASE

Clarence Victor (hereinafter Victor) here attempts to raise, in a collateral state court proceeding, a challenge to

the reasonable doubt jury instruction given at his trial. This issue was clearly defaulted at his trial and in the course of his direct appeal.

A. The Petitioner

Clarence Victor kills people. Prior to the brutal slaying of elderly Alice Singleton in 1987 for which he currently stands convicted, Victor was convicted and incarcerated for two other homicides. Victor was convicted in 1964 of manslaughter and in 1976 of second degree murder. ***State v. Victor***, 235 Neb. 770, 777, 457 N.W.2d 431 (1990), ***cert. denied*** 498 U.S. 1127 (1991) (hereinafter "***Victor I***").

B. The Crime.

On December 26, 1987, Victor went to the home of 82-year-old Alice Singleton, a woman for whom he had previously done some gardening work. Victor confessed that upon entering the home:

> [H]e struck the victim with his hand and knocked her down and then struck her in the head three times with a pipe which he said he carried in his car for protection. He claimed that Singleton got tangled in some type of blue cord and that he used his pocketknife to cut the cord loose from her throat. Victor indicated that he then left Singleton's residence and, on his way home, threw away his pocketknife, the blue cord, and the pipe.

Victor I, 235 Neb. at 776. At trial a pathologist testified that, in addition to numerous bruises and rib fractures there were discovered:

> five lacerations to Singleton's neck and throat area, three of which penetrated deeply. They were caused by a sharp instrument. One penetrated to the depth of the victim's thyroid cartilage, or Adam's apple, about three inches. Dr. Roffman also noted that one of the lacerations was characterized by an irregular border. He stated that such an irregular border usually meant that there was not one quick stroke with a weapon, but some hesitation or "stopping and going" as the laceration was made.

Id. Alice Singleton's death was attributed to a laceration of a branch of the carotid artery. It took 3 to 5 minutes for her to bleed to death following that wound. ***Victor I***, 235 Neb. at 777.

C. The Course of These Proceedings Below.

Victor was convicted of first degree murder by a jury of the District Court of Douglas County, Nebraska. At trial Victor did not raise a Due Process Clause-based challenge to the reasonable doubt jury instruction given his jury as required by state procedures. Victor was later sentenced to death by a panel of judges called to determine the appropriate punishment for that crime.

Under Nebraska law Victor was afforded a mandatory direct appeal of his conviction and sentence to the Nebraska Supreme Court. ***Victor I***. "On appeal, Victor does not challenge the overwhelming evidence that sustains his convictions . . . " ***Victor I***, 235 Neb. at 773.

Neither did Victor argue a Due Process Clause-based defect in the reasonable doubt instruction given his jury. ***Id.***

After affirmance of his conviction and sentence on direct appeal Victor sought a petition for writ of certiorari from this Court. That petition did not raise a Due Process Clause-based challenge to the reasonable doubt jury instruction given at his trial. On November 13, 1990, while Victor's petition was pending, this Court released its decision in ***Cage v. Louisiana***, 498 U.S. 39 (1990). Victor's petition for a writ of certiorari was subsequently denied by this Court. ***Victor v. Nebraska***, 498 U.S. 1127 (1991).

On May 10, 1991, Victor next filed with the District Court of Douglas County, Nebraska a state postconviction proceeding. JA 20-25. In that proceeding Victor raised for the first time two claims relevant here: (1) That the reasonable doubt jury instruction given at his trial violated due process of law under ***Cage*** (JA 21-22, paragraph 4); and (2) That his trial and appellate counsel was ineffective in failing to raise that issue (JA 24-25, paragraph 11). In resolving Victor's state postconviction claims, the state trial court concluded that the decision in ***Cage*** "should not be applied retroactively" to Victor's case. JA 26.

Victor then appealed the denial of state postconviction relief to the Nebraska Supreme Court. By the time Victor's appeal came on for decision, the Nebraska Supreme Court had already considered the impact of the decision in ***Cage*** upon the identical reasonable doubt instruction given in Victor's case and found it did not

violate the Due Process Clause. See ***State v. Morley***, 239 Neb. 141, 474 N.W.2d 660 (1991). In resolving Victor's state postconviction appeal the Nebraska Supreme Court noted:

> We have repeatedly held that a motion for postconviction relief cannot be used as a substitute for an appeal or to secure further review of issues already litigated on direct appeal. *** [Victor's] only attempt to avoid the procedural bar of the previously raised issues is by asserting that he was denied effective assistance of counsel because trial and appellate counsel **improperly** raised these issues.

JA 34-35 (emphasis theirs). The Nebraska Supreme Court then resolved Victor's ***Cage*** claim in the following manner.

> In ***Morley***, we upheld the constitutionality of the reasonable doubt language of the Nebraska jury instruction, finding the language distinguishable from that found unconstitutional by the U.S. Supreme Court in ***Cage***. Therefore, whether or not trial and appellate counsel failed to object to or appeal the jury instruction . . . [is] now irrelevant, causing this assignment of error also to be without merit.

JA 35-36.

This Court subsequently granted Victor's petition for writ of certiorari from that decision on the question of whether ***Cage*** should have been given retroactive application in Victor's case.

D. The Instruction

The reasonable doubt jury instruction given Victor's jury reads as follows:

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

(JA 11, Instruction No. 9)

SUMMARY OF ARGUMENT

Griffith v. Kentucky basically held that on direct appeal "similarly situated" petitioners should be treated the same. Petitioner is not similarly situated to Cage because Cage raised a due process objection to the Louisiana jury instruction at trial while petitioner Victor failed to raise this issue at trial or on direct appeal and hence, defaulted the issue. Therefore, under ***Griffith v. Kentucky***, Petitioner is not entitled to retroactivity of this Court's decision in ***Cage v. Louisiana***.

Insofar as ***Cage*** rejects the use of various words and phrases in explaining a "reasonable doubt", it is not a precedent that can be retroactively applied to any case because it used a jury "could" test rather than a "reasonable likelihood" test.

If Petitioner is entitled to retroactive application of ***Cage*** under ***Griffith v. Kentucky***, this Court should carve out an extraordinary disruption exception to ***Griffith*** in this case. While this Court established a basic rule of retroactivity in ***Griffith*** that may generally be workable, there are a few cases, such as the instant one, which have such widespread impact that they will produce an extraordinary disruption in the criminal justice system. Because the concept of reasonable doubt enters into every jury decision, a strict application of ***Griffith*** could result in tens of thousands of re-trials nationwide.

Finally, the Nebraska Supreme Court was correct when it unanimously upheld the constitutionality of Nebraska's reasonable doubt jury instruction. There is no reasonable likelihood that the Nebraska Instruction,

taken as a whole, was applied by the jury in an unconstitutional manner. ***Cage*** created no poison pills which automatically invalidate any reasonable doubt instruction. To do so would violate the "whole instruction" commandment of ***Estelle v. McGuire***.

The Nebraska Instruction is different from the ***Cage*** instruction in many ways, but most importantly because the Nebraska Instruction clearly and continuously focuses the jury's attention on the evidence, while ***Cage*** did not. While a phrase-by-phrase analysis is not an appropriate way to analyze a jury instruction, such an analysis would show the questioned phrases in the Nebraska Instruction have a strong basis in long established case law of this and other courts.

Nebraska's reasonable doubt jury instruction, unanimously upheld by the Nebraska Supreme Court following ***Cage***, and firmly rooted in long established case law, should not be struck down by this Court. However, if this Court does strike it down, it should do so only prospectively and this Court should not only tell Nebraska and the other 49 states what is wrong with our instruction but what a correct one looks like. Otherwise, there will be protracted litigation involving virtually every criminal jury trial as states write and rewrite reasonable doubt instructions until this Court approves one and lays the issue to rest. We are more than willing to explain reasonable doubt to our juries in any way the Constitution requires, but if Nebraska's present instruction does not do that, it is difficult to understand what instruction would.

ARGUMENT

Introduction

There is no doubt that the concept of "reasonable doubt" is the very bedrock of our system of criminal justice. Therefore, while great care must be taken to appropriately preserve and apply that concept in criminal trials, immeasurable chaos and confusion rumbles through the criminal courtrooms of this nation if that bedrock begins to shift. Do the decisions of this Court in ***Cage v. Louisiana***, 498 U.S. 39 (1990), ***Sullivan v. Louisiana***, ___ U.S. ___, 113 S.Ct. 2078 (1993), ***Boyde v. California***, 494 U.S. 370 (1990) and ***Estelle v. McGuire***, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) alter that bedrock concept? We think not. Yet the confusion resulting from ***Cage*** has, in and of itself, sent tremors through this country's criminal justice system. This is an opportunity to put that disquiet to rest.

This case presents the question whether this Court's ruling in ***Cage v. Louisiana***, 498 U.S. 39 (1990) should have retroactive application, in a state collateral proceeding, to a defaulted claim that Nebraska Pattern Jury Instruction 14.08, which defines the concept of "reasonable doubt" (hereinafter "Nebraska Instruction"), violates the Due Process Clause.

I.

THE STATE DISTRICT COURT WAS CORRECT IN REFUSING TO CONSIDER A *CAGE* DUE PROCESS CLAIM IN A STATE POSTCONVICTION PROCEEDING WHEN PETITIONER HAD DEFAULTED THE ISSUE AT TRIAL AND ON DIRECT APPEAL.

A.

This issue is in default

We do not believe that an issue defaulted on direct appeal is entitled to the retroactive application of any decision of this Court.

Victor did not raise a Due Process Clause-based objection to the Nebraska Instruction when given the opportunity to do so prior to his jury being instructed. Yet under Nebraska law it is clearly established that any objections to the nature or content of a proposed jury instruction **must be raised in the trial court** before that instruction is given the jury. Such a timely objection to a proposed jury instruction is not only crucial at trial but also crucial to the preservation of that issue for consideration of the Nebraska courts on appeal. ***Eg., State v. Van Ackeren***, 242 Neb. 479, ___ N.W.2d ___ (1993). Victor also did not raise a Due Process Clause-based objection to the Nebraska Instruction in the course of his mandatory direct appeal to the Nebraska Supreme Court (See ***Victor I***, 235 Neb. at 773), or in seeking a writ of certiorari from the affirmance of his direct appeal by the Nebraska Supreme Court. See ***Victor v. Nebraska***, No. 90-6259, ***cert.den.*** 498 U.S. 1127 (1991). It was not until **after** the

announcement of this Court's decision in ***Cage*** that Victor first sought to belatedly inject this issue into his case.[1]

Having failed to raise and preserve this issue in the course of his direct appeal, we now find ourselves in a state postconviction proceeding in which Victor seeks to collaterally attack his conviction by challenging the Nebraska Instruction by use of the decision in ***Cage***. Yet at this juncture again, Victor's effort runs afoul of reasonable state court procedural restrictions on the manner in which issues are to be presented the Nebraska courts.

> We have repeatedly held that a motion for postconviction relief cannot be used as a **substitute for [a direct] appeal** or to secure further review of issues already litigated on direct appeal.

JA 34-35 (emphasis added).

The question of the propriety of the Nebraska Instruction was defaulted, under well established state procedural rules, in Victor's direct appeal (including his petition for writ of certiorari to this Court), and in that condition his judgment of conviction and sentence thus became final without his having properly raised or preserved a Due Process Clause challenge to the Nebraska Instruction.

---

[1] Victor claims to have attempted to amend his petition for writ of certiorari after the decision in Cage was released. As we will discuss below, this is an issue which must be raised before the trial court, not belatedly injected in an already pending petition before this Court.

Under state court procedures the only valid claim Victor may now forward is his claim of ineffective assistance of counsel. That is the issue which was resolved by the Nebraska Supreme Court on the basis that the Nebraska Instruction does not violate the Due Process Clause. The Nebraska Supreme Court held that Victor's claim that his trial and appellate counsel were ineffective for failing to raise a Due Process Clause challenge to the Nebraska Instruction was without merit as that court had previously determined that the Nebraska Instruction was appropriate under ***Cage***. JA 35-36.

B.

Two types of retroactivity

This Court has granted certiorari to consider whether ***Cage*** has retroactive application to Victor's case. We believe there exist two types of retroactive application identified by the rulings of this Court. **(1)** The retroactive application of decisions of this Court to cases which were not "final" when that decision was announced, as discussed in ***Griffith v. Kentucky***, 479 U.S. 320 (1987). **(2)** The more restrictive retroactive application of decisions of this Court announced in the collateral context of federal habeas corpus proceedings, as discussed in ***Teague v. Lane***, 489 U.S. 288 (1989). Under the facts of this case only the ***Griffith*** type of retroactivity is at issue here, and we believe a state court default plays a decisive role in resolving the equities and merits of this question.

C.

Victor is not entitled to the benefits of *Griffith*-style retroactivity.

1.

It is clear from this record that Victor's direct appeal from his conviction and sentence was not "final" under standards articulated by this Court when the decision in ***Cage*** was announced. ***Griffith***, 479 U.S. at 321, fn. 6. ***Griffith*** held that any "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review . . . " ***Id.***, 479 U.S. at 716. At first blush this rule would appear to apply to Victor's case, but it does not.

In ***Griffith*** this Court was concerned with the "actual inequity" that results when only one of numerous **"similarly situated"** defendants becomes the chance beneficiary of a ruling of this Court upon a particular issue. ***Id.***, 474 U.S. at 713. See also ***Teague v. Lane***, 489 U.S. 311, 316 (1989). While there exists no chronological distinction between Victor's situation and that presented this Court in ***Griffith***, a pivotal distinction does arise from the fact that while Griffith wanted the retroactive benefit of the rule announced in ***Batson v. Kentucky***, 476 U.S. 79 (1986), he and Batson had **both** raised and preserved the **same** issue in the state courts and this Court at the **same** time. Their cases were **both** pending on petitions for a writ of certiorari on the **same issue** when ***Batson*** was decided. This is the very essence of how Batson and Griffith were "similarly situated."

Victor and Cage occupy a radically different relationship. A relationship not specifically addressed by this

Court in previous opinions. While Cage conceived of, raised and preserved his Due Process Clause challenge to Louisiana's reasonable doubt instruction in the trial and direct appeal of his conviction (See ***Cage***, 498 U.S. at 40), Victor did not. While Cage afforded his state trial and appellate court's the opportunity to rule upon his Due Process Clause claim, Victor did not. While Cage was before this Court urging his Due Process Clause Claim, Victor was before this Court arguing **entirely different issues**. Under these circumstances, not one of the equities recognized as being present in ***Griffith*** are present here to urge retroactive application of ***Cage*** to Victor's case. By defaulting this issue before the state trial and appellate courts in the course of his direct appeal, Victor distinguished himself from ***Griffith*** and put himself in a distinct class occupied by tens of thousands of state prisoners in the United States who did not raise this issue at trial five or ten or twenty years ago, but wish to do so now.

2.

In ***Griffith*** this Court noted the appropriate remedy when cases pending on direct appeal are "similarly situated". "We fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." ***Id.***, 479 U.S. at 713. Why then did this Court **not** employ such a remedy when Victor's direct appeal was pending before this Court at the same time as Cage's?

We assume Victor's petition for a writ of certiorari was denied in Victor's direct appeal exactly because

Victor was not before this Court raising the same issue presented in ***Cage***. By his failure to conceive of, raise and preserve his Due Process Clause challenge to the Nebraska Instruction in the Nebraska courts in the process of his direct appeal, Victor's direct appeal became final upon denial of his petition for writ of certiorari without obtaining review of his now belatedly urged ***Cage*** claim. Under this circumstance Victor is not entitled to the type of retroactivity discussed in ***Griffith*** because he was never "similarly situated" with Cage before that case was decided by this Court.

D.

The unnecessary burden of retroactively applying *Cage*.

In every criminal case which has ever gone to a jury in the history of this nation the term reasonable doubt has had to be employed. We do not even attempt to guess how many tens of thousands of jury verdicts now hang in the balance since the decision in ***Cage*** was announced. Even more mind boggling would be the number of pre-***Cage*** verdicts which potentially face post-***Cage*** examination and possible retrial unless reasonable limits are placed upon that decision's application.

The appropriate focus of the American criminal justice system has to be the trial courts. Trial courts are where the criminal law of this land is principally dispensed to the mass of the American people, not in the more heady environments of state appellate courts, and federal habeas corpus litigation. If error is to be identified, it should be identified, objected to, and resolved at

the trial court level based upon the law applicable at the time of trial. The application of new precedent at any other juncture needlessly diminishes the crucial role of the trial in our jurisprudence. See ***Griffith*** and ***Teague***. Furthermore, from a systemic standpoint, such a rule needlessly imposes significant retrial costs upon society, likely will cause the release from custody of many of the worst individuals our criminal justice system has been able to identify and isolate, and thus will ultimately reduce the public safety.

Language which had previously been approved or deemed unworthy of reversal by this Court has now been called into question by ***Cage***. Yet prior to ***Cage***, state trial courts such as those in Nebraska employed jury instructions which were the product of the diligent efforts of both the bench and bar in an absolute good faith belief such instructions accurately represented the law of this land.[2]

The same equities and interests in finality which this Court has previously recognized as mitigating against retroactivity in federal collateral proceedings, carry equal

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[2] States employing reasonable doubt instructions which contained the phrases "moral certainty" or "substantial doubt" or both prior to the decision in Cage: Alabama (*), Alaska (*), Arizona (sd), California (*), Connecticut (sd), Delaware (sd), Georgia (*), Idaho (mc), Illinois (mc), Kentucky (sd), Louisiana (*), Maryland (mc), Massachusetts (mc), Michigan (mc), Mississippi (mc), Missouri (sd), Montana (*), New York (mc), North Carolina (*), North Dakota (mc), Oklahoma (mc), Oregon (*), Rhode Island (*), South Carolina (*), South Dakota (mc), Tennessee (*), Texas (mc). "mc" = moral certainty. "sd" = substantial doubt. * = both.

weight with respect to Victor's state court collateral attack upon his conviction. He attempts to inject a clearly defaulted issue as the basis for obtaining a retrial of his guilt. This Court has regularly recognized the problems inherent in crediting such an attempt. See ***Griffith***; ***Teague***.

E.

Impact of this decision on subsequent federal collateral review.

Should Victor's conviction and sentence be sustained here, his case will next surely ripen into a federal habeas corpus proceeding. We urge this Court, in the context of resolving this issue, to give clear notice that an individual who cannot show entitlement to the benefit of ***Griffith***-style retroactivity can **never**, through the ***Teague*** exceptions, obtain retroactive application of new law to his already final conviction.

II.

CAGE'S CONCERN WITH CERTAIN WORDS USED IN A REASONABLE DOUBT JURY INSTRUCTION CANNOT BE RETROACTIVELY APPLIED TO ANY CASE BECAUSE *CAGE* DID NOT USE A "REASONABLE LIKELIHOOD" TEST.

If Victor's default does not dispose of this case, then we must ask whether ***Cage***, to the extent that it addresses only particular phrases within a jury instruction, currently represents the law of this county applicable to evaluation of jury instructions defining reasonable doubt. We believe that subsequent decisions of this Court have

so altered the standards of appellate review of such questions that *Cage* no longer offers credible guidance in any case. If we are correct in that conclusion, then *Cage* certainly should not be afforded retroactive application to this case.

We note that this Court in deciding *Cage*, as well as the Nebraska Supreme Court in deciding *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), employed the standard of review for evaluating jury instructions described in *Francis v. Franklin*, 471 U.S. 307, 316 (1985). This Court has since specifically rejected the continued use of that standard of review as being too speculative. *Boyde v. California*, 494 U.S. 370 (1990); *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. at 482 n.4 (1991); and *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2669 (1993).

We urge this Court to consider that the change in appellate standard of review established by *Boyde* and *Estelle v. McGuire* is material and significant, and standing alone might well have dictated a different result in *Cage*, much less in the present case. See *Sullivan*, 113 S.Ct. at 2081 n.1. While the basic principle applied in *Cage*, that due process requires an appropriate explanation of the term "reasonable doubt", unquestionably remains the law, the constitutional appropriateness of the jury instruction questioned in *Cage* is necessarily an open question since those words were judged by a "could have" standard rather than a "reasonable likelihood" standard. Since *Cage* used a now rejected standard to evaluate terms such as "moral certainty", it cannot now be deemed authoritative precedent regarding the constitutionality of those terms and hence, clearly should not

be applied retroactively in so far as it rejected any particular phrase or group of phrases used to define a reasonable doubt.

III.

IF THIS COURT NOW REJECTS THE USE OF LONG ACCEPTED PHRASES SUCH AS "TO A MORAL CERTAINTY" TO DEFINE BEYOND A REASONABLE DOUBT, BASED UPON USE OF THE "REASONABLE LIKELIHOOD" TEST, *GRIFFITH* SHOULD BE MODIFIED TO PREVENT EXTRAORDINARY DISRUPTION IN STATE CRIMINAL JUSTICE PROCEEDINGS.

We do not believe Victor is entitled to the benefits of *Griffith*-style retroactivity. We further believe that when concepts as fundamental and oft employed by our courts as reasonable doubt are called into question, that strong policy arguments exist for only prospective application of such decisions even among those cases similarly situated and not final.

The courts of this nation have proceeded to create their reasonable doubt jury instructions without definitive guidance from this Court and in good faith reliance upon prior related rulings of this Court. As this Court noted in *Boyde* and *Estelle v. McGuire* we are here, at best, dealing with after-the-fact judicial speculation as to the impact of the language in question upon a jury. This Court has previously discussed the easily anticipated disruption of our judicial system which results from retroactive application of such speculation.

> Such probabilities must in turn be weighed against the prior justified reliance upon the old

> standard and the impact of retroactivity upon the administration of justice.

Stovall v. Denno, 388 U.S. 293, 387 (1967). See also ***Griffith***, 479 U.S. at 329-334. (Chief Justice Renhquist, dissenting. Justice White, dissenting.)

We cannot imagine any ruling having a more pervasive impact upon the criminal justice system of this country than to expose every jury instruction on reasonable doubt to retroactive scrutiny. The disruption to the criminal justice system of this country of such a ruling would be incalculable, and surely mitigates in favor of an extraordinary disruption exception to the general rule of retroactivity established by ***Griffith*** under these unique circumstances.

IV.

THE NEBRASKA SUPREME COURT WAS CORRECT IN DECLINING TO ADDRESS THE RETROACTIVITY ISSUE BECAUSE NEBRASKA'S REASONABLE DOUBT JURY INSTRUCTION IS, IN ANY EVENT, CONSTITUTIONAL.

A.

DEFINING "REASONABLE DOUBT"

1.

The Nebraska Instruction must be evaluated in light of the requirements of the Due Process Clause, yet ***Cage*** offers no definition of the phrase "reasonable doubt" by which to judge this case. ***Cage*** merely informs us that one definition, evaluated under a now disapproved standard, failed in the attempt.

While Victor and other opponents of the ***Cage*** phrases send us to our dictionaries to review the common meaning of the questioned phrases, their effort to seek from the same sources a functional definition of the pivotal phrase – reasonable doubt – is conspicuous by its absence.

The basic proposition is this: If a jury, after considering the evidence, has a **reasonable doubt** as to the defendant's guilt, the jury must acquit. See JA 12, Instruction No. 10.

We begin, then, with the noun "doubt".

> [T]he subjective state of being uncertain of the truth of a statement or the reality of an event as a result of incomplete knowledge or evidence.

Webster's Third International Dictionary (Unabridged) (1981). However, "doubt" is not enough. The "doubt" must be "reasonable" which is defined as: "Being in agreement with right thinking or right judgment: not conflicting with reason: not absurd: not ridiculous." ***Id.*** Therefore, a jury must acquit any defendant where there exists a subjective state of uncertainty as to the defendant's guilt which is (1) based upon the evidence and (2) neither illogical, absurd or ridiculous. The term "reasonable doubt" is itself defined as:

> solid doubt about the actual guilt of a defendant that arises or remains after careful and impartial examination of the evidence.

Id.

On the other hand a jury cannot convict a defendant unless the government, based upon the evidence, has

established a defendant's guilt "beyond" a reasonable doubt. See JA 7, Instruction No. 1, Section I. That is: the government's evidence has convinced the jury of a defendant's guilt "to a degree or amount greater than" any doubt which is reasonable. The American Heritage Dictionary (Second College Edition, 1982)

We are here concerned with identifying a particular quantum of "doubt", we are never concerned with "certainty". For example, unless "moral" is read to imply a belief based upon something other than the evidence, then establishing a defendant's guilt to a "certainty" – moral or otherwise – is a much **greater** burden than that imposed upon the government by the Due Process Clause, because "certainty" means "believed without reservation or doubt" and that is **not** the constitutional standard for conviction. See Webster's Third International Dictionary (Unabridged) (1981).

2.

For instruction on the meaning and purpose of the concept of reasonable doubt *Cage* directs our attention to this Court's opinion in ***In re Winship***, 397 U.S. 358 (1970).

In *Winship* this Court noted: "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation." ***Id.*** at 361. "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting upon **factual error**." ***Id.*** at 363 (emphasis added).

While the majority opinion in ***Winship*** addressed the constitutional significance of the concept of guilt beyond a reasonable doubt, it too failed to define the concept. However, some guidance on the question was provided by the concurring opinion of Mr. Justice Harlan which addressed the concept and complications of defining "reasonable doubt", as well as the fundamental goal that concept is intended to achieve.

> [A] standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

Id. at 370.

In this country's legal system there exist two primary standards of proof: (1) a preponderance of the evidence and (2) proof beyond a reasonable doubt. ***Winship*** teaches that what we attempt to do in a criminal case by employing the phrase "reasonable doubt" is to impress upon the factfinder the concept that something **more** than a preponderance of the evidence is required to deprive an individual of his liberty. The sole purpose of the concept of reasonable doubt is to reduce the "error in factfinding" inherent in any trial to a level acceptable to society. See ***Speiser v. Randall***, 357 U.S. 513, 525-526 (1958). However, a coherent explanation of **how much more** than a preponderance of the evidence is required or how to describe it accurately to a lay jury has not been forthcoming.

> The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of **communicating**

> **intelligibly** . . . a sound method of self-analysis for one's belief,

(emphasis added) 9 J. Wigmore, Evidence 325 (3d. ed. 1940). ***Id.*** at 369 (Mr. Justice Harlan, concurring.) Yet communicating intelligibly and accurately the concept of reasonable doubt to a lay jury is exactly the challenge created by ***Cage***.

B.

THE RISK OF NOT DEFINING REASONABLE DOUBT UNDER *BOYDE*

Some courts have required that juries determine the innocence or guilt of criminal defendants with **only** the benefit of the words "reasonable doubt" to guide them, and ***Cage*** would appear to encourage that practice. See ***United States v. Moss***, 756 F.2d 329, 333 (4th Cir. 1985) "District courts are again admonished not to define reasonable doubt in their jury instructions," cited with approval in ***Cage***, 498 U.S. at 41.

We do not hesitate to suggest that the concept of reasonable doubt, standing alone, has little meaning to most people. As jurists and lawyers we may think we understand that phrase (after years of study and consideration), but under ***Boyde*** that is **not** the test. The test is the commonsense understanding of those words by a lay jury. Yet if one applies ***Boyde*** to an "undefined" context we believe there exists a very "reasonable likelihood" that a lay jury given only the words "reasonable doubt" to guide them would glean little meaning or an inappropriate meaning from those two bare words standing alone.

> If each juror is allowed to decide guilt based on [his or her] own, individual understanding of what is meant by reasonable doubt there is no way to ensure that the proper standard is applied.

Henry A. Diamond, ***Reasonable Doubt: To Define or Not to Define***, 90 Colum.L.Rev. 1716 (1990). See also J. P. McBaine, ***Burden of Proof: Degrees of Belief***, 32 Cal.L.Rev. 242 (1944).

The problem of accurately defining reasonable doubt under the Due Process Clause is vexatious. Do we turn juries loose to manufacture, by numberless committees of twelve, a numberless variety of lay definitions of reasonable doubt without judicial assistance, or do we afford the trial courts of this country the deference afforded by the ***Boyde*** and ***Estelle v. McGuire*** standard of review in their good faith efforts to define that which has not been defined by this Court, or does this Court now undertake the responsibility of offering a definition of reasonable doubt for the **prospective** use of the courts of this country? We strongly urge this Court to undertake one of the two latter alternatives.

C.

DISTINGUISHING THE NEBRASKA INSTRUCTION FROM *CAGE*

Contrary to "uninstructed" jurisdictions, the State of Nebraska has gone to considerable good faith effort to impress upon its jurors the significance of the burden placed upon the state to establish the guilt of the accused. JA 2-17.

The lesson of ***Winship*** is that the fundamental concern of the Due Process Clause is the accuracy of the factfinding process – that a jury must be impressed by the fact that the government's burden is great **and** that the jury's decision must be based upon the evidence before them. If a jury is likely to believe, once instructed, either that the state's burden is nothing more than a preponderance of the evidence **or** that it may appropriately resolve the matter before it based upon suspicion or belief arising from something **other than** the evidence before it, then clearly error of the most fundamental nature has occurred.

What does the Nebraska Instruction accomplish in defining reasonable doubt that the instruction considered in ***Cage*** did not? Generally, the Nebraska Instruction, taken as a whole, defines the concept of reasonable doubt in a constitutionally appropriate manner. The Nebraska Instruction clearly focuses the jury's attention upon the **evidence** in the case, as opposed to the instruction in ***Cage***, where speculation could lead one to conclude that a conviction could result based upon something **other** than a jury's evaluation of the evidence before it.

As we will discuss below in greater detail, there exists no doubt that Victor's jury knew the state was required to convince them of Victor's guilt beyond a "reasonable doubt", and that they were required to determine Victor's innocence or guilt based **solely** upon a review of the evidence before them. The Constitution requires nothing more.

D.

THE FRAMEWORK OF DECISION

Our analysis of the Nebraska Instruction begins with three thoughts. First, as noted above in ***Boyde***, strong public policy interests argue against forcing the release or retrial of convicted criminals based solely upon judicial speculation – occurring long after the fact – of the possible thought processes of a jury.

Second, "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." ***Miles v. United States***, 103 U.S. 304, 312 (1880). Yet today ***Boyde*** instructs us that it is solely the "minds of the jury" about which we are required to speculate.

Third, ***Boyde*** gives us this insight as to how we, as judges and lawyers, should view and credit the mental processes of the jury.

> [j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers [or judges] might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with ***commonsense*** understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde at 494 U.S. 381. (Emphasis added).

E.

THE APPROPRIATE STANDARD OF REVIEW

1. The reasonable likelihood test

The appropriateness of the Nebraska Instruction will be governed by the test announced by this Court in ***Boyde v. California***, 494 U.S. 370 (1990) and ***Estelle v. McGuire***, 502 U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) for evaluating an allegedly inaccurate jury instruction. That test being "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in an inaccurate manner. ***Boyde***, 494 U.S. at 380. In adopting this standard, this Court noted the policy considerations which support the heavy burden placed upon the complaining party.

> There is, of course, a strong policy in favor of accurate determination of the [question before the jury], but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

Id. (emphasis added).

2. Instructions must be evaluated as a whole

"It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." ***Estelle v. McGuire***, ___ U.S. ___, 112 S.Ct. 475, 482 (1991); citing ***Cupp v. Naughten***, 414 U.S. 141, 147 (1973).

The jury instructions given in Victor's case make over a dozen references to the fact that the jury could not find Victor guilty unless convinced beyond a reasonable doubt of his guilt. (JA 2-14) In each instance the concept of reasonable doubt is directly and solely tied to the jury's evaluation of the **evidence** before it. These instructions as a whole do not violate the Due Process Clause.

3. *Cage* created no "poison pills"

Cage expressed concern with three phrases contained within the Louisiana reasonable doubt instruction: (1) "grave uncertainty; (2) "actual substantial doubt"; and (3) "moral certainty". After noting the presence of the first two phrases, the ***Cage*** opinion states:

> When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Cage, 498 U.S. at 41.

We draw two immediate conclusions from that language. First, it was the use of these phrases **in the aggregate** and **exactly** as Louisiana employed them which then violated the Constitution. It is illogical to assume that ***Cage*** created three "poison pills" which, in any context, destroy the validity of a challenged instruction. Such a construction would completely ignore the "whole instruction" commandment of ***Estelle v. McGuire***. Each

challenged instruction must rise or fall upon the merits of its individual syntax and context.

Second, that if any particular phrase contained in the Louisiana instruction was pivotal to its invalidity, it was the **manner** in which that instruction employed the phrase "moral certainty". It appears it was Louisiana's unique use of that phrase which lead this Court to conclude, under the ***Francis v. Franklin*** test, that a conviction under the Louisiana instruction could have been arrived at **without** "evidentiary certainty". We agree that any jury instruction which would allow a verdict based upon anything other than the evidence is fundamentally corrupt.

However, neither of these infirmities infect the Nebraska Instruction or the individual phrases discussed below.

F.

MORAL CERTAINTY

The Nebraska Instruction contains the following sentence:

> [Reasonable doubt] is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused.

JA 11, Instruction No. 9.

1.

The use of the term "moral certainty" to impress upon jurors the gravity of their decision and the significance of the government's burden of proof has historical precedent before this Court. The concept appears to have first arisen in ***Commonwealth v. Webster***, 5 Cush. 295, 320 (1850) and was cited with approval in ***Perovich v. United States***, 205 U.S. 86, 92 (1906). In ***Miles v. United States***, 103 U.S. 304, 309 (1880) this Court stated:

> Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind **to a moral certainty** that the fact exists that is claimed to exist, so that you feel certain that it exists.

(emphasis added)

> 'I am convinced [all evidence considered and weighed] of the defendant's guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty.

Wilson v. United States, 232 U.S. 563, 570 (1914). In ***Fidelity Mutual Life Ass'n. v. Mettler***, 185 U.S. 308, 317 (1901) this Court stated: "Proof to a 'moral certainty' is an **equivalent** phrase with 'beyond a reasonable doubt'. [citations omitted]" (emphasis added)

Language almost identical to that contained in the Nebraska Instruction was approved in ***Agnew v. United States***, 165 U.S. 36, 51 (1896).

> By a reasonable doubt is not meant a possible doubt, but such a doubt arising from the evidence that leaves the minds of the jury in such a

> state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused.

Compare JA 11, Instruction No. 9.

All of these definitions or descriptions of reasonable doubt have this in common: In each instance the "moral certainty" of the defendant's guilt was specifically tied to the evidence in the case. That is exactly what is done by the Nebraska Instruction, and what was apparently not accomplished by the instruction in ***Cage***.

Until ***Cage*** there existed significant **support** in the opinions of this Court for employing the phrase "moral certainty" to accurately define the concept of reasonable doubt, and we believe, if taken in the appropriate context, that support remains unaltered by ***Cage***. It is a verdict tied to the evidence and one that reflects the significance of the government's burden of proof which is required by the Constitution and, **used properly**, the concept of "moral certainty" accomplishes both of those goals. In the Nebraska Instruction the concept of "moral certainty" was employed properly and accurately to the end that the goals of the Due Process Clause were achieved.

The "moral certainty" cases cited with approval in ***Cage*** offer little assistance here. ***United States v. Indorato***, 628 F.2d 711 (1st Cir. 1980) did not find the use of the term "moral certainty" in that reasonable doubt instruction to be reversible error. The instruction given by the trial court in ***United States v. Byrd***, 352 U.S. 570 (2nd Cir. 1965) is so grammatically incomprehensible as to require reversal because it is unintelligible.

In addition, we find no support for the proposition the phrase "moral certainty", standing alone, violates the Due Process Clause. The ultimate question under the Due Process Clause is whether such phrases, in the aggregate, violate the Constitution.

For lower court cases regarding this phrase, see Addendum 1.

2.

Furthermore, while both the Nebraska Instruction and the ***Cage*** instruction contain the phrase "moral certainty", the use of that phrase within the two instructions is facially and radically different.

We believe a fair reading of the Louisiana instruction's use of the phrase "moral certainty" is: "What is required [to convict] is not an absolute or mathematical certainty, but a moral certainty." ***Cage***, 498 U.S. at 40. Not once does this sentence focus the attention of the Louisiana jury upon the evidence before them. In this unique context, one might speculate that a jury could conclude that a "moral" intuition of the defendant's guilt, as opposed to a belief based upon the evidence before them, would suffice to support a verdict of guilty. Such a possibility must have prompted this Court to state:

> When those statements are then considered with the reference to "moral certainty," **rather than evidentiary certainty**, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a

> degree of proof below that was required by the Due Process Clause.

Cage, 498 U.S. at 41 (emphasis added).

In contrast, the Nebraska Instruction informed Victor's jury:

> [A reasonable doubt] is such a doubt as will not permit you, **after full, fair, and impartial consideration of all the evidence**, to have an abiding conviction, to a moral certainty, of the guilt of the accused.

(JA 11, Instruction No. 9. Emphasis added.) As opposed to the Louisiana instruction, under the Nebraska Instruction the "moral certainty" of the accused's guilt can have but one source – it can arise only "after full, fair and impartial consideration of all the evidence." Under the Nebraska Instruction "moral certainty" of the guilt of the accused is the **product of evidentiary certainty**, not the antithesis of it.

"Moral certainty" in this context, where within the same sentence the jury is informed a reasonable doubt "will not permit" conviction of the accused, demonstrates the **gravity** of the belief in the defendant's guilt the juror must possess to convict. It in no respect lightens the government's burden of proof or directs the attention of the jury away from the evidence in arriving at its verdict.

3.

Considering these instructions as a whole, as we are required to do, produces even more evidence that

Victor's jury was clearly instructed to avoid any non-evidentiary basis for their verdict.

> In determining any questions of fact presented in this case, you should be governed **solely by the evidence** introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence.

JA 2, Instruction No. 1 (emphasis added).

In addition, the Nebraska Instruction itself contains language specifically informing the jury that its verdict cannot be based upon "mere possibility, from bare imagination, or from fanciful conjecture." JA 11, Instruction No. 9.

4.

Finally, this portion of the instruction is **cautionary** in tone. It tells jurors **not** to convict unless their full, fair and impartial consideration of all the evidence convinces them of the defendant's guilt.

> "[W]hile a reasonable reading of the *Cage* instruction leads one to the conclusion that an accused is to be ***convicted*** unless such doubt rises to the level of moral certainty, the [Nebraska] instruction permits conviction only if the **lack** of such doubt is established to a moral certainty . . . "

State v. Morley, 239 Neb. at 155, 474 N.W.2d at 670 (Emphasis added).

> In other words, under the *Cage* instruction a juror is to vote for ***conviction*** unless convinced

> to a moral certainty that there exists a reasonable doubt, whereas under the [Nebraska] instruction a juror is to vote for ***acquittal*** unless convinced to a moral certainty that no reasonable doubt exists. Those are two very different instructions; indeed, one contradicts the other.

Id. (emphasis added).

G.

ACTUAL AND SUBSTANTIAL DOUBT

Both the ***Cage*** instruction and the Nebraska Instruction utilize the words "actual, substantial, doubt." In the Nebraska Instruction those words are employed in the following context:

> A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

JA 11, Instruction No. 9. In contrast, the ***Cage*** instruction simply stated: "[A reasonable doubt] is an actual substantial doubt." ***Cage***, 498 U.S. at 40.

1.

The ***Cage*** opinion offers little analysis of exactly how the Court found this phrase offensive to the Due Process Clause, and ***Taylor v. Kentucky***, 436 U.S. 478 (1978), cited with approval in ***Cage***, specifically **did not find** the use of that phrase, standing alone, reversible error.

Two conclusions can be drawn from these facts. First, it is the presence of these words **in conjunction with** other troublesome language within an instruction that may ultimately cause the Due Process Clause to be violated, not that phrase standing alone. Second, the **exact** use of that language within an instruction in each instance will be pivotal to properly resolving the constitutional question.

2.

Again, what initially distinguishes this portion of the Nebraska Instruction from the Louisiana instruction, is the constant emphasis the Nebraska Instruction places upon the jury's reliance upon the **evidence** in the case. The Nebraska Instruction goes to greater effort than did the Louisiana instruction to assure the "evidentiary certainty" required by ***Cage***.

The Louisiana instruction directly equates "reasonable doubt" with "actual, substantial doubt", which under the Louisiana instruction's reliance upon the potentially non-evidentiary based concept of "moral certainty" might well result in a verdict having no reference to the evidence in the case at all.

In stark contrast is the language of the Nebraska Instruction which **never** allows the jury's attention to drift from the evidence before them.

For lower court cases regarding this phrase, see Addendum 2.

H.

GRAVE UNCERTAINTY

First, we note the Nebraska instruction contains only two of the three phrases questioned in ***Cage***. The Nebraska Instruction does not employ the phrase "grave uncertainty" in any context. In ***Cage*** apparently the effect of the questioned phrases were evaluated by this Court in the aggregate. If that is the appropriate analysis, then the absence of one of those phrases from the Nebraska Instruction alone distinguishes it from the instruction reviewed in ***Cage***.

Second, the grammatical use of the remaining phrases within the Nebraska Instruction, on its face and as interpreted by the Nebraska Supreme Court, is the antithesis of the Louisiana instructions struck down in ***Cage***. See ***State v. Morley***, 239 Neb. 141, 474 N.W.2d 660 (1991).

Third, the Nebraska Instruction repeatedly and clearly focused the attention of Victor's jury solely upon the evidence before them and created **no reasonable likelihood** that Victor's jury based its verdict on anything other that the evidence before them.

I.

STRONG PROBABILITIES

Victor here also complains of the Nebraska Instruction's use of the phrase "strong probabilities of the case". This language was never at issue in ***Cage***.

The sentence of the Nebraska Instruction containing this phrase reads as follows:

> The jury may find an accused guilty upon the strong probabilities of the case, **provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable**.

JA 11, Instruction No. 9. (Emphasis added.)

1.

Frankly, we have difficulty grasping Victor's concerns with this language. Victor argues that the use of the this phrase allows a jury to reach a verdict on "a presumption of guilt rather than proof of guilt" and that this language allows conviction by a preponderance of the evidence rather than beyond a reasonable doubt. Petitioner's Brief, p. 23-26. The very sentence within which the contested phrase is found belies that contention.

> The jury may find an accused guilty upon the strong probabilities of the case, **provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable**.

JA 11 (emphasis added).

2.

Victor confuses the government's burden of proof with the legitimate uses to which evidence may be put to **meet** that burden. In that context other instructions given Victor's jury are relevant. Instruction No. 1 states, in part:

> In determining questions of fact presented in this case, you should be governed solely by the

> evidence introduced before you. *** Each of you may apply to the subject before you that general knowledge which anyone of you may be presumed to have . . .

JA 3. Instruction No. 11 addressed direct and circumstantial evidence and stated, in part:

> Evidence is circumstantial when it relates to the existence or nonexistence of facts from which a material element of the crime charged may be inferred and when that inference usually and reasonably follows according to the common experience of mankind.

JA 12. Instruction No. 10 concerns the element of intent and instructs the jury, in part:

> [Intent] is rarely – if ever – susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. But before intent can be inferred from such circumstantial evidence alone, it must be of such character as to exclude every reasonable conclusion except that the defendant had the required intent.

JA 12. "The burden is **always** on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden **never shifts**." JA 8. (emphasis added).

We believe these instructions, individually and taken as a whole, represent an accurate statement of the law, and do nothing to distract from the constitutionally required level of evidentiary certainty necessary to convict Victor of his crimes.

3.

Even if the Nebraska Instruction had equated reasonable doubt with the "strong probabilities of the case", this Court has upheld such an instruction.

> It is urged that the court failed to instruct the jury as to what constitutes a reasonable doubt, and that in speaking of it it used the term "strong probabilities." . . . And so, when the court in this case said to the jury, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt – that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the **strong probabilities** of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt," it gave all the definition of reasonable doubt which a court can be required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done. While it is true that it used the words "probabilities" and "strong probabilities," yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law. ***Hopt v. Utah***, 120 U. S. 430, 439: ***Commonwealth v. Costley***, 118 Mass. 1, 23.

Dunbar v. U.S., 156 U.S. 185, 198-99 (1895).

V.

THERE IS NOT A REASONABLE LIKELIHOOD THAT THE JURY IN THIS CASE WAS MISLED

None of the phrases singled out by Victor for criticism, standing alone, present Due Process Clause concerns. Therefore, we must next consider whether these phrases, in the aggregate, and taking the Nebraska Instruction and its companion instructions as a whole, violate the Due Process Clause. We must consider whether under ***Boyde*** and ***Estelle v. McGuire***, "there is a reasonable likelihood that the jury has applied the challenged instruction" in an inaccurate manner. ***Boyde***, 494 U.S. at 380. We think not.

Again, we believe the analytical linchpin of ***Cage*** is the concern of the Due Process Clause with the "evidentiary certainty" of the proceeding. The Nebraska Instruction clearly and repeatedly tells the jury that it is the **evidence** before them, and **only** the evidence before them, which can form the basis of their verdict. The Nebraska Instruction does not permit a verdict based upon "mere possibility, from bare imagination, or from fanciful conjecture." JA 11. The burden of proof is clearly upon the state to establish the accused's guilt in the minds of the jury beyond a reasonable doubt. The Nebraska Instruction taken as an entity or taken in the context of the jury instructions as a whole **does not reduce** or confuse the jury's perception of the state's burden of proof.

In ***Boyde*** this Court aptly stated that ***common sense*** was the key to understanding what reasonable doubt meant in light of the totality of the instructions. There

does not exist a "reasonable likelihood" in the case at bar that Victor's jurors interpreted the trial court's definition of reasonable doubt as lowering the government's burden of proof by misstating the degree of certainty required to convict, or the degree of doubt required to acquit.

CONCLUSION

Because Victor defaulted his due process claim at the trial and on direct appeal, he is not similarly situated with Petitioner in ***Cage*** and may not raise the issue in postconviction proceedings. Even if Petitioner can persuade this Court to allow him to resurrect an issue which he has procedurally defaulted, certain aspects of ***Cage*** cannot appropriately be applied to this or any other case.

We do not challenge the basic premise that due process requires that an explanation of the term "reasonable doubt" must be constitutionally appropriate. However, when the Court applied that concept to specific words and phrases in ***Cage***, it used a now rejected test rather than the "reasonable likelihood" test. Accordingly, until the various words and phrases at issue have been properly evaluated in the context of the instruction as a whole and under a reasonable likelihood test, there is no precedent in ***Cage*** to apply and presumably this Court's older precedents discussing moral certainty and other terms remain effective.

If the Court now applies the reasonable likelihood test to the Nebraska jury instruction and rejects long accepted terms such as "moral certainty" and "strong possibilities", then the Court should, at the same time,

modify ***Griffith*** to provide for an extraordinary disruption of the state criminal justice proceedings exception to the general rule that new rules will be applied to cases which have not yet become final. Because the concept of beyond a reasonable doubt is used in every criminal jury trial, the rejection of long approved explanations of reasonable doubt would have a broader and more disruptive impact than nearly any other new rule might have.

Finally, the Nebraska Supreme Court declined to address the retroactivity issue because it found Nebraska's reasonable doubt jury instruction to be constitutional. Nebraska's reasonable doubt jury instruction repeatedly focuses the jury's attention on the evidence and uses explanatory phrases that have either expressly or impliedly been approved by this Court or other federal courts in the past. The Nebraska Supreme Court's unanimous decision that the Nebraska reasonable doubt jury instruction, **taken as a whole**, does not violate due process should be upheld by this Court.

Respectfully submitted,

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ADDENDUM 1

The court in ***U.S. v. Love***, 767 F.2d 1052, 1060 (4th Cir.), ***cert denied***, 474 U.S. 1081 (1986) ruled that an instruction which referred to reasonable doubt as "reasonable moral certainty" did not warrant reversal. The portion of the instruction in ***Love*** which is similar to the instruction in the present case's use of "moral certainty" read as follows: "reasonable doubt exists in any case when after a careful and impartial consideration of all the evidence, you the jury does [sic] not feel convinced to a reasonable moral certainty that a Defendant is guilty of the charges." ***Id***. 767 F.2d at 1060 n. 10. This above-mentioned reference to "reasonable moral certainty" was not found to have diluted the prosecution's burden of proof, or increased the degree of doubt to acquit. The Second Circuit in ***U.S. v. Magnano***, 543 F.2d 431, 436 n.4 (2nd Cir.), ***cert denied***, 429 U.S. 1091 (1977) held that the trial court's use of moral certainty in its reasonable doubt jury instruction was not found unconstitutional. The phrase "moral certainty" was used in the same manner as Nebraska's instruction, i.e., acquit unless convicted to a moral certainty that no reasonable doubt exists. ***U.S. v. Drake***, 673 F.2d 15, 21 (1st Cir. 1982) (The use of the phrase "moral certainty" is disapproved, but standing alone, does not constitute plain error); ***Hatheway v. Secretary of The Army***, 641 F.2d 1376, 1384 (9th Cir.), ***cert denied***, 454 U.S. 864 (1981) (The use of the phrase "moral certainty" although not ideal, did not obscure or distort the meaning of reasonable doubt); ***U.S. v. Franzese***, 392 F.2d 954, 964-65 (2nd Cir. 1968) (A trial court's explanation to the jury of the phrase "beyond a reasonable doubt to a moral certainty", a term used by defense counsel in

summation, that proof "to a moral certainty" and proof "beyond a reasonable doubt" were essentially equivalents was not constitutionally infirm); ***Bradford v. State***, 412 S.E.2d 534, 536 (Ga. 1992) (Instruction permissible when court only used "moral reasonable certainty"); ***People v. Jennings***, 807 P.2d 1009, 1041-42 (Cal.), ***cert denied***, 125 S.Ct. 443 (1991) (Finding use of term "moral certainty" to be proper); ***Com. v. Beldotti***, 567 N.E.2d 1219, 1225 (Mass. 1991) (Instruction permissible with "moral certainty" language); ***Adams v. State***, 587 So.2d 1265, 1268-69 (Ala.Cr.App. 1991) (Finding permissible use of terms "actual and substantial doubt" and "moral certainty"); ***Smith v. State***, 588 So.2d 561, 567-69 (Ala.Cr.App. 1991) (Finding no error in use of terms "actual and substantial doubt" and "moral certainty").

ADDENDUM 2

None of the individual phrases in question, standing alone, offend the Constitution. It is their specific grammatical use combined with the presence of other arguably problematic phrases which may drag an instruction beyond constitutional propriety.

The use of the phrase "substantial doubt", standing alone, was not found to merit reversal in ***Taylor v. Kentucky***, 436 U.S. 478, 488 (1978).

In ***U.S. v. Fallen***, 498 F.2d 172, 176-77 (8th Cir. 1974), this Court ruled that the jury instruction defining "reasonable doubt" in terms of "substantial doubt" conveyed the proper concept of reasonable doubt where the phrase "substantial doubt" was used only once and "beyond a reasonable doubt" was otherwise explained. In ***Fallen*** it was explained as "the kind of doubt that would make a reasonable person hesitate to act" and "proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly." This same concept is found in the Nebraska Instruction: " 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent man, . . . to pause and hesitate before taking the represented facts as true and relying and acting thereon."

JA 11, Instruction No. 9.

Also, the Third Circuit in ***U.S. v. Smith***, 468 F.2d 381, 383 (3rd Cir. 1972), held that use of the language "substantial reasonable doubt" when viewed contextually, accurately conveyed the concept of reasonable doubt. The Court stated "[r]easonable doubt of itself is substantial, rendering the specific use of the word unimportant. It is

sufficient if the jury understands reasonable doubt to mean 'a real or substantial doubt generated by the evidence or a lack of it.' ***Holland v. United States***, 209 F.2d 516 (10th Cir. 1954)." The present reasonable doubt charge in the same sentence where "substantial doubt" was cited, instructed the jury that the doubt was to arise by the evidence (facts and circumstances shown by the evidence) or the lack thereof.

Moreover, in ***Darnell v. Swinney***, 823 F.2d 299, 302 (9th Cir.), ***cert denied***, 484 U.S. 1059 (1988), the Court of Appeals held that the state trial court's reference to "actual and substantial" doubt in instructing the jury regarding the reasonable doubt standard did not unconstitutionally dilute the prosecution's burden of proof so as to infect the entire trial as to deprive the petitioner of due process; ***See also U.S. v. Delibac***, 925 F.2d 610, 614 (2nd Cir. 1991) (Charge which equated reasonable doubt with "substantial doubt" was not ruled as plain error); ***Hatheway v. Secretary of The Army***, 641 F.2d 1376, 1384 (9th Cir. 1981) (The use of the phrase "substantial doubt" did not obscure or distort the meaning of reasonable doubt); ***Gaskins v. McKeller***, 916 F.2d 941, 952-53 (4th Cir.), ***cert denied***, 111 S.Ct. 2277 (1991) (The trial court's use of the term "substantial doubt", when reviewed in the context of the entire instruction, did not so infect the entire trial that the resulting conviction violated due process); ***Smith v. Bordenkircher***, 718 F.2d 1273, 1277 (4th Cir.), ***cert denied***, 466 U.S. 976 (1984) (Equating "reasonable doubt" with "good and substantial doubt" was not per se unconstitutional, nor was it unconstitutional when taken in context of the entire instruction); ***U.S. v. Zimeri-Safie***, 585 F.2d 1318, 1322 (5th Cir. 1978) (The use of

"substantial" with regard to reasonable doubt is disapproved, but said use of "substantial" did not constitute reversible error); ***U.S. v. Rodriquez***, 585 F.2d 1234, 1241 (5th Cir. 1978) (Although the use of the term "substantial" was not encouraged, when viewed contextually, the use of "substantial" when referring to reasonable doubt did not constitute reversible error); ***Payne v. Smith***, 667 F.2d 541, 546-47 (6th Cir.), ***cert denied***, 456 U.S. 932 (1982) (The use of the phrase "substantial doubt" when referring to "reasonable doubt" was constitutionally adequate); ***U.S. v. Aiken***, 373 F.2d 294, 299 (2nd Cir.), ***cert denied***, 389 U.S. 833 (1967) (Jury charge that a reasonable doubt is doubt based on reason, a substantial doubt and not a speculative doubt, was not erroneous); ***U.S. v. Gratton***, 525 F.2d 1161, 1162 (7th Cir. 1975) (Use of the words "substantial doubt" in referring to "reasonable doubt" did not constitute plain error); ***U.S. v. Breedlove***, 576 F.2d 57, 58-59 (5th Cir. 1978) (When viewed in context of the entire reasonable doubt charge, the language that a "reasonable doubt means an actual, substantial, real doubt arising from the evidence" did not overstate the degree of uncertainty required for reasonable doubt); ***U.S. v. Christy***, 444 F.2d 448, 450-51 (6th Cir.), ***cert denied***, 404 U.S. 949 (1971) (Use of the word "substantial" in regards to reasonable doubt, when used only once and explained that "reasonable doubt" was that which is not a whimsical or capricious doubt but a substantial one, was not error); ***State v. Jones***, 582 So.2d 973, 974-75 (La.App.4 Cir. 1991) (The court found no error with regard to a reasonable doubt jury instruction which equated reasonable doubt with an "actual or substantial doubt"); ***Lord v. State***, 806 P.2d 548, 554 n.1-556 (Nev. 1991) (A reasonable doubt jury instruction which equated

reasonable doubt with the words "actual and substantial" was not ruled as violating the holding of ***Cage***); ***see also Adams v. State, supra***; and ***Smith v. State, supra***.

Supreme Court, U.S.
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No. 92-8894

In The

Supreme Court of the United States

October Term, 1993

CLARENCE VICTOR,

Petitioner,

vs.

NEBRASKA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of the State Of Nebraska

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. RESPONDENT'S UNTIMELY, HYBRID CLAIM OF PROCEDURAL BAR AND/OR NONRETROACTIVITY HAS NO BASIS IN EXISTING LAW, AND SHOULD NOT BE GIVEN ONE.

Respondent first seeks to avoid the Court's consideration of the constitutional issue in this case on procedural grounds. Respondent grudgingly acknowledges that the Nebraska Supreme Court unambiguously ruled on the merits of the *Cage* issue, so it cannot dispute the Court's jurisdiction to consider it.[1] See *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983); *Mills v. Maryland*, 486 U.S. 367, 371 n.3 (1988). Nor does Respondent dispute that Petitioner's case was pending on certiorari from direct appeal at the time *Cage v. Louisiana*, 498 U.S. 288 (1990), was decided, so it cannot claim application of *Cage* to this case is barred by the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

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[1] Respondent is misleading in its representation of the Nebraska Supreme Court's treatment of this issue. The statements regarding the limited role of Nebraska postconviction review quoted at page 11 of Respondent's brief were addressed to a different group of "previously raised issues. . . ." See J.A. 36. The *Cage* issue was addressed only on its merits. See J.A. 35 – not merely as part of a claim of ineffective assistance of counsel, as Respondent claims. Resp. Brief at 12. The discussion of the ineffective assistance claim was separate and distinct from the decision on the merits of the *Cage* issue itself. See J.A. 33-35.

If there were any doubt about this, the Nebraska Supreme Court recently dispelled it by again reaffirming *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), and noting that it had done so in this case and the issue was pending before this Court. *State v. Cook*, 1993 WL 520410 (Neb. Sup. Ct. No. S-92-1096, filed December 17, 1993).

Instead, Respondent asks the Court to create a new, hybrid default/nonretroactivity rule, based on the idea that Petitioner is not "similarly situated" to the defendant in *Cage* because his counsel did not make a trial objection. Resp. Br. 13-15. Respondent gives no reason, besides its desire to avoid the merits of the constitutional issue in this case, why this Court should take this unprecedented step. There are several reasons the Court should not do so.

First is the fact that Respondent raised no similar claim of procedural bar in its Brief in Opposition to the Petition for Certiorari in this case. The failure to raise a procedural issue in the Brief Opposing Certiorari should, itself, preclude consideration of Respondent's argument at this time. Rule 15.2; See *City of Canton v. Harris*, 498 U.S. 378, 384 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985).

Second is the fact Respondent's proposed new rule would be directly inconsistent with current law regarding retroactivity, see *Griffith v. Kentucky*, 479 U.S. 314 (1987), and procedural default, *Harris v. Reed*, 489 U.S. 255 (1989). The law to date has been clear and consistent that "[i]f the last state court to be presented with a particular claim reaches the merits, it removes *any bar* to federal court review that might otherwise be available." *Ylst v. Nunnemaker*, 111 S.Ct. 2590, 2593 (1991) (emphasis added). Respondent's only authority for its new and different rule is an out-of-context citation to the equal treatment principles espoused in *Griffith* and *Teague*. What Respondent misses is that the references in those cases to "similarly situated" defendants was directed to those litigants' *chronological* situation, not every aspect of their cases.

No two parties are "similarly situated" in all respects; and there is no particular relation between the equal treatment principles on which *Griffith* was based and trial objections. The former are principles of federal law; the latter are governed by state procedural rules. What Respondent forgets is that different states have different rules governing whether a trial objection, or an appellate brief, or a state postconviction petition adequately presents a constitutional issue. This Court has treated litigants from different states as "similarly situated," with respect to the adequacy of their preservation of a federal issue, when the highest state court to examine their claim has found the issue adequately preserved to address it on the merits. Acceptance of Respondent's argument would exchange that straightforward retroactivity rule into a complex new code, which would make the retroactivity of every decision different in every case, depending upon whether a given defendant could claim enough similarities between his case and the precedent he cites to qualify for its application.[2]

---

[2] Respondent's proposal assumes that new constitutional rules are announced only in cases in which there have been trial objections which meet its standards. Of course, they are not: some states consider constitutional claims raised for the first time on appeal; others forgive default in capital cases; others have a variety of exceptions to contemporaneous objection rules. Would Respondent's argument be the same if *Cage* were a case in which the Louisiana Supreme Court had forgiven a trial default, or considered an issue for the first time on appeal? By Respondent's logic, in that event the only litigants who would be "similarly situated" to Mr. Cage would be those who had not made trial objections. Would *Cage* extend only to them? Or would litigants who had made trial objections be entitled to even more favorable constitutional rules? Or would Respondent's new retroactivity rule simply be inapplicable in such cases?

The law regarding default, retroactivity, and the other procedural limits on federal court's consideration of federal constitutional claims is complex enough. To blur these two lines of authority would magnify that complexity severalfold. It also would effectively create a whole new set of Federal Rules of State Trial Procedure, which would operate independently of the rules set by the states themselves, to determine whether or not a defendant would qualify for the "retroactive" application of federal precedents to his case. That would be the antithesis of the deference to state sovereignty which the Court has held should be paramount in this area and indeed the deference Respondent and its *amici* seek. *Coleman v. Thompson*, 111 S.Ct. 2546 (1991).

The Nebraska Supreme Court has made its position clear on the merits of this federal constitutional issue. It has reiterated that position, even when the issue is raised in a postconviction proceeding – in this case, and in others. See *State v. Cook, supra*. It is the Nebraska Court's prerogative to determine when and how it will decide federal constitutional claims. When it does, this Court's certiorari jurisdiction runs to review that state court's "final judgments and decrees," whatever preceded them. 28 U.S.C. §1257. Respondent's belated effort to change that fundamental federal/state relationship to avoid review in this case should be rejected.

II. RESPONDENT HAS IDENTIFIED NO LEGALLY-SUFFICIENT DISTINCTION BETWEEN THE INSTRUCTION GIVEN IN PETITIONER'S CASE AND THE UNCONSTITUTIONAL CAGE INSTRUCTION.

Respondent and several *amici* writers have attempted to distinguish the jury instruction given at Petitioner's trial, (J.A. 11), from the *Cage* instruction. These arguments merely play with semantics.

When the two instructions are read in sequence, they are in fact nearly identical in tone and content. The overall impression left by each of the instructions is a notion of "moral certainty," "substantial doubt," and "strong probabilities," which both substitute for the "indispensable" concept of reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970).

Much of Respondent's position is derived from the approach used by the Nebraska Supreme Court in its attempt to salvage Nebraska's instruction in the wake of *Cage*. This same anallysis was rightly criticized by the United States District Court for the District of Nebraska: "[t]he fact that the wording of a particular instruction is distinguishable from the *Cage* instruction does not necessarily mean that the thought conveyed is also different, nor does it mean the instruction comports with due process." *Morley v. Stenberg*, 828 F.Supp. 1413, 1419 (D. Neb. 1993). When instructions are compared, "similarity of language may simplify the analysis, but dissimilar language by no means ends the inquiry." *Ibid*.

In this case, one is presented with the "simplifying" factor of extremely similar language, with only very

slight dissimilarities. The dissimilarities in no way salvage NJI 14.08 from *Cage* criticism. NJI 14.08 contains the "moral certainty" and "actual and substantial doubt" terminology which was condemned in *Cage*, along with equally troubling "strong probabilities" language. NJI 14.08 states that a reasonable doubt is "an actual and substantial doubt." This is exactly the same terminology as that which was specifically discussed and disapproved in *Cage* ("an actual substantial doubt"). 498 U.S. at 40. *Cage's* disapproval of the term "substantial doubt" was based upon the fact that "substantial" as it is commonly understood, "suggests a higher degree of doubt than is required under the reasonable doubt standard." *Id.* at 41.

This analysis is clearly correct. "Substantial" and "reasonable" amounts of any commodity are not the same amounts.

The Respondent attempts to defend NJI 14.08's usage of the term "substantial doubt" by noting that the instruction states that the doubt must arise from the evidence or lack thereof. This is simply irrelevant. It makes no difference that the instruction points out the proper *origins* of doubt (the evidence) if the *amount* of doubt (reasonable) is improperly defined ("substantial"). Regardless of where a juror finds the source of his doubt, the doubt is not helpful to the accused if the juror is led to believe that the doubt is not sufficiently "substantial," despite the fact that the doubt may meet the definition of "reasonable."

As the Eighth Circuit observed, disapproving the "substantial doubt" language twenty years ago in *United States v. Atkins*, 487 F.2d 257, 260 (8th Cir. 1973): "Proof of guilt beyond a reasonable doubt would seem to require a

greater evidentiary showing by the government than proof beyond a substantial doubt. For this reason, we do not approve of the alternative statement that reasonable doubt means a substantial doubt." See Petitioner's Brief on the Merits at page 21.

The Tenth Circuit Court of Appeals recently employed much of the same analysis in disapproving "substantial doubt" language. *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990). The Court quoted the following language with approval:

> "There is a significant difference between 'reasonable' doubt and 'substantial' doubt. The word, substantial, according to 'Webster's New World Dictionary' (1961) means 'real; actual; true; strong; solid; firm; ample; large; or of substantial value.' We think that when consideration is given to the definition and to the ordinary meaning of this word, there is little doubt but that its use tends to lessen the State's burden and as a natural corollary to increase the burden upon the defendant."

Id. at 891 quoting *United States v. Salley*, 9 M.J. 189, 192 (C.M.A. 1980) (citations omitted). See also, *United States v. Wright*, 542 F.2d 975, 988 (7th Cir. 1976) (warning that any Court using "substantial doubt" language "can reasonably expect a reversal"); *United States v. Alvero*, 470 F.2d 981 (5th Cir. 1972) (granting a new trial due to the Court's definition of reasonable doubt as "a very substantial doubt").

Respondent cites numerous cases which purportedly demonstrate that the equation of substantial doubt and reasonable doubt is an acceptable practice. Resp. Br. at 36.

Those cases lend little, if anything, to Respondent's position. The only decisions which were rendered subsequent to *Cage* were the state cases. Those cases are notable only for their dearth of serious analysis of either the instructions involved or their relationship to *Cage*.[3]

The federal cases cited by Appellant in its Addendum are equally unpersuasive. *Taylor v. Kentucky*, 436 U.S. 478 (1978) clearly questioned the "substantial doubt" language noting the frequent criticism it has received and saying, in dicta, that the phrase is "*perhaps* not in itself reversible error." *Id. at 478* (emphasis added). This is hardly an endorsement.

All of the other federal cases cited by Respondent were decided prior to *Cage*. Furthermore, most of them note the harsh criticism which has been leveled at the "substantial doubt" formulation, and many of the courts join in that criticism.[4]

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[3] For example, *State v. Jones*, 582 So.2d 973 (La. App. 4th Cir. 1991) (Respondent's Brief Addendum 2, p. 5) asserts that "substantial doubt" is acceptable language, with no analysis of *why* it is acceptable except to note the absence of *Cage's* other two criticized terms, (one of which is present here). *Id.* at 975. *Lord v. State*, 806 P.2d 548, 555 (Nev. 1991), adopts the same approach. *Adams v. State*, 587 So.2d 1265 (Ala. Cr. App. 1991), and *Smith v. State*, 588 So.2d 561 (Ala. Cr. App. 1991), both refuse to condemn reasonable doubt instructions, but they do so solely on the grounds that the instructions did not contain "grave uncertainty" language. No further analysis is provided by the Alabama courts.

[4] See, *e.g.*, *United States v. Fallon*, 488 F.2d 172, 176-77, (8th Cir. 1974) (specifically reaffirming *Atkins* condemnation of the language); *Darnell v. Swinney*, 823 F.2d 299, 302 (9th Cir. 1988) (noting the "universal" criticism of the phrase); *United States v. Delibac*, 925 F.2d 610, 614 (2d. Cir. 1991) (failing to cite or discuss *Cage*, but referring to the language as "an unenlightening instruction that we have only 'tolerated.'"); *Hathaway v. Secretary of the Army*, 641 F.2d 1376 (9th Cir. 1981) (noting the criticism of the phrase); *Gaskins v. McKellar*, 916 F.2d 941, 952-53 (4th Cir. 1990) (specifically disapproving the language); *Smith v. Bordenkircher*, 718 F.2d 1273, 1277 (4th Cir. 1984) (noting uniform disapproval of the language and stating that court shared that viewpoint); *United States v. Zimiri-Safie*, 585 F.2d 1318, 1322 (5th Cir. 1978) (any future use of the language would be cause for reversal); *United States v. Rodriquez*, 585 F.2d 1234, 1241-42 (5th Cir. 1978) (same as *Zimiri-Safie*); *Payne v. Smith*, 667 F.2d 541, 546-47 (6th Cir. 1981) (noting criticism of the language); *United States v. Gratton*, 525 F.2d 1161, 1162 (7th Cir. 1975) (language was not plain error, but *was* objectionable); *United States v. Breedlove*, 576 F.2d 57 (5th Cir. 1978) (approving instruction which was used, but noting that Court has reversed on basis of "substantial doubt" language in the past).

Given the extremely weak support which Respondent and *amici* counsel's cited cases provide for "substantial doubt" language *prior* to *Cage*, it would seem likely that those courts' analyses would be quite different after the *Cage* decision. The Fourth Circuit Court of Appeals has held that an instruction which contained "substantial doubt" and "moral certainty" language violated *Cage*. *Adams v. Aiken*, 965 F.2d 1306, 1311 (4th Cir. 1992).[5]

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[5] *Adams* also held that *Cage* constitutes a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989). 965 F.2d at 1311-12. A case announces a "new rule" when it "breaks new ground or imposes a new obligation on the State or the Federal government," or "if the result was not *dictated* by precedent" prior to the case. 965 F.2d at 1311 (quoting *Teague*). If *Cage* announces a new rule, then the analyses of the pre-*Cage* courts cited by Respondent and its *amici* are simply irrelevant.

NJI 14.08 states, as does the *Cage* instruction, that mathematical certainty of guilt is not required to support a conviction. It says that a juror must have "an abiding conviction, *to a moral certainty,*" of guilt. (emphasis added). This language is virtually identical to the terminology which this Court specifically rejected in *Cage*. Moral certainty is a concept which suggests the possibility of conviction on the basis of intuition, or some factor other than *evidentiary* certainty, which is the only truly acceptable guidepost. *Cage*, 498 U.S. at 41; *Adams v. Aiken*, 965 F.2d at 1311; *State v. Manning*, 409 S.E.2d 372, 374 (S.C. 1991) (reversing conviction on the basis of instruction containing "moral certainty" and "substantial doubt" language); Brief of Petitioner, *Sandoval v. California*, No. 92-9049 at 20, 30.

Respondent again attempts to distinguish the use of this language in Petitioner's case from the *Cage* instruction based upon semantics. But as we read *Cage*, the Court condemned the injection of the very *concept* of moral certainty into jury instructions, *regardless* of the precise phrasing. 498 U.S. at 41. It is true that the Nebraska jury instruction tells jurors to consider all of the evidence; but the Louisiana instruction did as well, calling attention to evidence or its "satisfactory" or "unsatisfactory" nature. *Cage*, 498 U.S. at 40. Nonetheless, the Court found that the "moral certainty" and "substantial doubt" language to impermissibly dilute the constitutionally required standard of proof.

Respondent attempts to resurrect the Nebraska Supreme Court's perceived distinction between NJI 14.08 and the Louisiana instruction regarding moral certainty.

The Nebraska court's confusing "distinction" is as follows:

> [W]hile a reasonable reading of the *Cage* instruction leads to the conclusion that an accused is to be convicted unless such *doubt* rises to the level of a moral certainty, the questioned instruction permits conviction only if the *lack* of such doubt is established to a moral certainty. In other words, under the *Cage* instruction, a juror is to vote for conviction unless convinced to a moral certainty that there exists a reasonable doubt, whereas under the questioned instruction, a juror is to vote for acquittal unless convinced to a moral certainty that no reasonable doubt exists. Those are two very different instructions; indeed, one contradicts the other.
>
> *State v. Morley*, 239 Neb. 141, 155, 474 N.W.2d 660, 670 (1991). (emphasis added).

The Nebraska Supreme Court's interpretation of the Louisiana "moral certainty" language is directly contrary to this Court's reading of the Louisiana instruction as "stat[ing] that what was required was a 'moral certainty' *that the Defendant was guilty.*" *Cage v. Louisiana*, 498 U.S. at 41 (emphasis added). This is exactly the same approach which is expressed by the jury instruction in this case. There is *no* suggestion by this Court that the Louisiana instruction requires that there be moral certainty of a juror's *doubt*. With respect, we can see no basis for the Nebraska Supreme Court's reading of the Louisiana instruction, or Respondent's.

There is one and only one fairly arguable difference between this instruction and the one condemned in *Cage*:

this instruction did not use the phrase "grave uncertainty." Respondent and its *amici* correctly point out that, in an opinion respecting the denial of *certiorari* in *Gaskins v. McKellar*, 111 S.Ct. 2277 (1991), Justice Stevens suggested those words may have been a particular concern in *Cage*. But we do not read Justice Stevens' opinion to say that it is only the use of those words that led to the reversal in *Cage;* that would contradict the *Cage* opinion itself.

The lower court opinions in *Gaskins* do not set out the full text of the instruction challenged there; their focus was on the phrase "substantial doubt." See *Gaskins v. McKellar*, 916 F.2d 941, 952 (4th Cir. 1990). Neither those opinions, or Justice Stevens, suggests that the instruction there contained the "moral certainty" language shared by the instruction in *Cage* and the one in this case. Nor is there any suggestion that the South Carolina court instructed the jury – as the Nebraska court did here – that "strong probabilities" could amount to proof beyond a reasonable doubt, or that the jurors could be "fully aware of the possibility that [they] could be mistaken," and yet convict. See J.A. 11.

We submit this language – which Respondent and its *amici* ignore – denigrates the concept of proof beyond a reasonable doubt at least as much as the "grave uncertainty" language used in *Cage*.[6] We are reinforced in this

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[6] Moreover, we note that the Nebraska instruction does suggest doubts must be "grave," in its reference to doubts that would influence a decision "in one of the graver and more important transactions of life. . . . " J.A. 11. The context of this sentence does not make it clear whether the "grave" decision would be to convict or acquit. Jurors could easily read this sentence, in connection with the "substantial doubt" language, to mean that their doubts must be sufficiently substantial to lead them to take the "grave" step of acquitting a defendant they think is possibly or probably guilty of a serious crime.

by the decision of the Fourth Circuit – the court whose decision was challenged in *Gaskins* – in *Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992). The court in Adams rejected the argument that the phrase "grave uncertainty" in *Cage* was a talisman for reversal. Accord, *State v. Manning*, 409 S.E.2d 372 (S.C. 1991).

We believe those courts are correct, that *Cage* meant what it said and did not establish a constitutional rule which turned on a specific word or – as many of Respondent's arguments essentially argue – on particular forms of punctuation. *Cage* held that an attempt to define reasonable doubt[7] could convey a degree of certainty which fell below the minimum required by due process – and that the language of the jury instruction in that case fell below that minimum. Although there are some minor differences – differences which we submit cut both ways – we cannot see a meaningful difference between this instruction and the one in *Cage;* and neither the Respondent nor its formidable array of *amici* have convincingly demonstrated one.

---

[7] We have no quarrel with the argument – made most effectively by the Solicitor General – that it would be constitutional, and may be advisable, to give juries no definition of "proof beyond a reasonable doubt" at all. Brief of the United States at 6. The issue in this case however is not whether a definitional instruction must be given; the question is whether it violates due process to give an instruction which diminishes the concept in the manner of the instruction condemned in *Cage*.

Sandoval v. California presents this Court with the question of whether one part of the *Cage* instruction, alone – "moral certainty" – is sufficient, alone, to violate due process. This case presents the question of whether, as Respondent would have it, due process is violated only where the exact words of the *Cage* instruction are repeated verbatim. We cannot believe *Cage* established such a formalistic rule. Wherever, between *Cage* and *Sandoval*, the constitutional line is drawn, the instruction in this case falls outside it.

III. RESPONDENT'S DIRE PREDICTIONS OF THE EFFECT OF A REVERSAL IN THIS CASE ARE GREATLY EXAGGERATED.

The Respondent's brief mimics some of the arguments made by the State of California and its *amici* in *Sandoval v. California*, regarding the impact of a decision that finds constitutional error in any instruction which defines proof beyond a reasonable doubt in terms of "moral certainty." Resp. Br. 15. see Resp. Br.; *Sandoval v. California* and *amici*'s briefs[8]. From a review of the instructions compiled by the Petitioner in *Sandoval*, these

[8] Notably, the several states which filed as *amici* in *Sandoval* did not make similar predictions regarding the effect on them of a reversal in this case. See, Brief of Amicus Curiae of the States of Massachusetts, etc., *Sandoval v. California*, No. 92-9049. Similarly, although the Solicitor General's Brief is less clear on the distinction, it is plain from a review of the standard federal instructions it describes that the instruction challenged here bears little resemblance to the instructions used in federal criminal trials. Brief of the United States at 11.

fears appear to us to be somewhat exaggerated; Respondent's clearly are. Few, if any, states appear to use the kind of multi-flawed language which appears in this case and *Cage*. In Nebraska itself, the defective instruction is no longer used. See Petitioner's Brief, *Sandoval v. California* at Appendix B-23. The only cases which would be directly affected by a decision in Petitioner's favor would be those which, like his, became final after *Cage*, but were tried before the advent of the new standard instruction. We have no estimate of those numbers; but certainly, they are levels of magnitude lower than the figures thrown out in the Respondent's Brief.[9] It has been three years since the Court's decision in *Cage*; although a number of cases have raised the issue, we see no sign of the kind of general clearing of the jails Respondent warns of. We doubt that the application of *Cage's* rule to this virtually-identical case will have any such effect.

We do not mean by this to deny the significance of this issue. It is true that there are a substantial number of cases in Nebraska which may be affected by a reversal here, particularly in light of the Nebraska Supreme Court's decision to consider this issue in postconviction proceedings. If retrials are required in these cases, that will impose some real costs on the state. But it should not be forgotten that there are costs – human, moral, legal, and financial, – involved in the incarceration and execution of prisoners who have not been found guilty of

[9] There are only approximately three thousand people presently incarcerated in the entire Nebraska prison system. In Nebraska, as elsewhere, most convictions result from guilty pleas, not trials.

crimes by the standard of certainty set by the constitution. If *Cage* is correct in its underlying premise, some of those convictions are wrong; some of those prisoners are not truly guilty beyond a reasonable doubt, and should have their convictions set aside. Many of them, doubtless, are guilty; and their retrials will therefore likely result in another conviction.

This case is not about those prisoners, however. This case is about Clarence Victor. Mr. Victor stands condemned, not because of his prior criminal record, or even because he killed Alyce Singleton, but because a jury found that killing was premeditated. On that crucial issue, there was room for doubt; but the jury was told to ignore those doubts unless they were "substantial," to convict of the highest degree of crime if it found a "fair probability" its elements were proven, to decide not on the evidence but on its "moral" conviction. We maintain that *Cage* holds those are not the standards the constitution requires. That is the only issue properly before this Court for decision in this case.

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully Submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1993

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ON WRITS OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA AND THE SUPREME COURT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the jury instructions given in these cases on the meaning of reasonable doubt violated the Due Process Clause.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The Due Process Clause requires the government to prove a defendant's guilt beyond a reasonable doubt in every criminal case. The question of how the reasonable doubt standard should be presented to the jury will therefore affect every federal prosecution tried to a jury.

STATEMENT

1. *Victor* v. *Nebraska*. Clarence Victor was convicted by a jury of murder in the first degree and was sentenced to death. The Nebraska Supreme Court affirmed petitioner's conviction and sentence on direct appeal, 457 N.W.2d 431 (1990), and this Court denied certiorari, 498 U.S. 1127 (1991). Victor then sought post-conviction relief, which was denied first by the trial court and then by the Nebraska Supreme Court. 494 N.W.2d 565 (1993). This Court granted Victor's petition for a writ of certiorari on September 28, 1993. J.A. 44.

At trial, the court instructed the jury on the meaning of reasonable doubt as follows, J.A. 11 (Ninth Instruction):

> "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

2. *Sandoval* v. *California*. Alfred Arthur Sandoval was convicted by a jury on four counts of first degree murder and on one count of attempted murder. The jury sentenced him to death on one murder count and to life imprisonment without the possibility of parole on the remaining murder counts. The California Supreme Court affirmed petitioner's convictions and sentence. J.A. 95-149. This Court granted the petition for a writ of certiorari on September 28, 1993, and consolidated the case with *Victor* v. *Nebraska*, No. 92-8894. J.A. 151.

At the guilt phase, the trial court instructed the jury on the meaning of reasonable doubt as follows, J.A. 49:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

At the penalty phase, the court similarly instructed the jury as follows, J.A. 93:

As to any crime or criminal act of which defendant is accused as a factor in aggravation, he is presumed innocent until the contrary is proved beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of any crime or criminal acts of which defendant is accused used an aggravating factor.

SUMMARY OF ARGUMENT

A. Due process does not require "reasonable doubt" to be defined for juries. There has long been disagreement over the wisdom of attempting to define the term. This Court has said that attempts to explain the concept of reasonable doubt ordinarily do not clarify it for the jury, and authorities such as Dean Wigmore have concluded that attempted definitions add nothing to the jury's understanding of the term and may be confusing.

B. Where courts choose to define reasonable doubt, the Constitution does not require that a particular jury instruction be given. Rather, due process tolerates a broad range of definitions. This Court has approved definitions that characterize "reasonable doubt" as "a doubt based on reason" and that define "proof beyond a reasonable doubt" as proof to a "moral certainty." The lower federal courts traditionally have given trial courts broad latitude to define reasonable doubt, and some of them have drafted

model jury instructions, all of which differ to some degree, and all of which permissibly define the term.

C. The jury instructions in this case do not run afoul of *Cage* v. *Louisiana*, 498 U.S. 39 (1990). The principal vice of the jury instruction denounced in *Cage* was the language equating a "reasonable doubt" with a "substantial" doubt and with a "grave" doubt. Neither the instruction used in *Victor* v. *Nebraska* nor the instruction given in *Sandoval* v. *California* made that erroneous equation. The use of the term "moral certainty" was disapproved in *Cage*, but the use of that term, in proper context, is not error. This Court's pre-*Cage* precedents have approved the use of that term, and it is likely that, if anything, jurors interpret that phrase to impose a heightened standard for reasonable doubt, not a lower one.

ARGUMENT

THE JURY INSTRUCTIONS GIVEN IN THESE CASES ON THE MEANING OF REASONABLE DOUBT DID NOT VIOLATE THE DUE PROCESS CLAUSE

Under the Due Process Clause, no one may be convicted of a crime except upon proof beyond a reasonable doubt of every element of a charged offense. *In re Winship*, 397 U.S. 358 (1970); *Jackson* v. *Virginia*, 443 U.S. 307 (1979). The question in these cases is whether the jury instructions on the meaning of the term "reasonable doubt" violated the Due Process Clause by lightening the prosecution's burden of proof. In our view, the instructions did not have that effect.

Proper analysis of this case involves three questions: The first question is whether the Due Process

Clause requires a trial court to define the reasonable doubt standard for the jury. The second is how large a range of definitions the Due Process Clause will tolerate. The third is whether the jury instructions given here fell beyond that range. In particular, the issue is whether the Court's per curiam opinion in *Cage* v. *Louisiana*, 498 U.S. 39 (1990), requires that the judgments below be set aside.

A. The Due Process Clause Does Not Require A Trial Court To Define For The Jury The Meaning Of "Reasonable Doubt"

1. The rule that criminal defendants must be found guilty beyond a reasonable doubt "dates at least from our early years as a Nation." *In re Winship*, 397 U.S. at 361; accord *Apodaca* v. *Oregon*, 406 U.S. 404, 412-413 & n.6 (1972) (plurality opinion).[1] By contrast, there has emerged no settled view that reasonable doubt must be defined for juries. See, *e.g.*, 9 J. Wigmore, *Evidence* § 2497, at 405 (J. Chadbourn rev. ed. 1981); 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 1.8(f), at 80 (1986). During the 19th century, some courts attempted to define reasonable doubt, while others concluded that it was unwise to do so. Compare, *e.g.*, *Commonwealth* v. *Costley*, 118 Mass. 1, 24 (1875) (attempting to define reasonable doubt) (Gray, C.J.), with *State* v. *Sauer*, 38 N.W. 355, 356 (Minn. 1888) ("The term

[1] In this country, the reasonable doubt rule dates back perhaps as far as 1770 and received widespread application by the mid-19th century. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U.L. Rev. 507, 515-524 (1975); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1301-1302 & n.9 (1977).

'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply.") (Mitchell, J.); see *State* v. *Ostrander*, 18 Iowa 435, 458-459 (1865).

This Court's precedents dispel any notion that the Constitution requires a court to define reasonable doubt for the jury. In *Miles* v. *United States*, 103 U.S. 304, 312 (1880), the Court stated that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." The Court has reaffirmed that view on several occasions. See *Holland* v. *United States*, 348 U.S. 121, 140 (1954); *Dunbar* v. *United States*, 156 U.S. 185, 199 (1895); see also *Hopt* v. *Utah*, 120 U.S. 430, 440 (1887) ("an instruction to the jury that they should be satisfied of the defendant's guilt beyond a reasonable doubt [has] often been held sufficient, without further explanation").

2. Some authorities from earlier in this century hold (or state in dictum) that it is error for a trial court not to define reasonable doubt for the jury. See *Friedman* v. *United States*, 381 F.2d 155, 160 (8th Cir. 1967) (dictum); *Williams* v. *United States*, 271 F.2d 703, 705 (4th Cir. 1959) (dictum); *Blatt* v. *United States*, 60 F.2d 481, 481 (3d Cir. 1932); *Nanfito* v. *United States*, 20 F.2d 376, 378 (8th Cir. 1927); *Schencks* v. *United States*, 2 F.2d 185, 187 (D.C. Cir. 1924). That view, however, is not the modern understanding.

The current state of the law in the federal system is as follows: Three circuits take the view that the trial judge should not define reasonable doubt for the jury, since the definition is likely to add little to the jury's understanding of the concept and may in some instances lead to jury confusion. See *United States* v.

Glass, 846 F.2d 386, 387 (7th Cir. 1988);[2] *United States* v. *Moss*, 756 F.2d 329, 333 (4th Cir. 1985);[3] *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1060-1061 (5th Cir.), cert. denied, 483 U.S. 1035 (1987). Five other courts of appeals have held that it is not error for a district court to refrain from defining a "reasonable doubt." See *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993);[4] *United States* v. *Nolasco*, 926 F.2d 869, 872 (9th Cir.) (en banc), cert. denied, 112 S. Ct. 111 (1991); *United States* v. *Olmstead*, 832 F.2d 642, 646 (1st Cir. 1987), cert. denied, 486 U.S. 1009 (1988); *United States* v. *Ivic*, 700 F.2d 51, 68-69 (2d Cir. 1983); cf. *Whiteside* v. *Parke*, 705 F.2d 869, 871-873 (6th Cir.), cert. denied,

[2] The Seventh Circuit has pattern jury instructions that do not define reasonable doubt and recommend against doing so. The Seventh Circuit's instructions state that "[t]he Committee recommends that no instruction be given defining 'reasonable doubt.' The phrase 'reasonable doubt' is self-explanatory and is its own best definition. Further elaboration [tends to] weaken and make imprecise the existing phrase." *Federal Criminal Jury Instructions of the Seventh Circuit* 2.07 (1980).

[3] The Fourth and Seventh Circuits are split as to whether reasonable doubt should be defined if the jury asks the court to do so. Compare *United States* v. *Russell*, 971 F.2d 1098, 1108 (4th Cir. 1992) (court should define if jury is "demonstrably confused or uncertain"), cert. denied, 113 S. Ct. 1013 (1993), with *United States* v. *Blackburn*, 992 F.2d 666, 668 (7th Cir.) (court should refuse jury requests for definition), cert. denied, 114 S. Ct. 393 (1993).

[4] The D.C. Circuit has expressly repudiated its earlier position. See *United States* v. *Taylor*, 997 F.2d at 1558 ("[W]e are now of the opinion that the greater wisdom may lie with the Fourth Circuit's and Seventh Circuit's instruction to leave to juries the task of deliberating the meaning of reasonable doubt.").

464 U.S. 843 (1983). In light of these more recent developments, the older decisions expressing the view that it is error not to define reasonable doubt are now of questionable authority.[5]

3. As the debate among the authorities strongly suggests, a trial court's refusal to define reasonable doubt does not violate due process, because it does not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Medina* v. *California*, 112 S. Ct. 2572, 2577 (1922), quoting *Patterson* v. *New York*, 432 U.S. 197, 202 (1977). Even more today than in the past, the concept of reasonable doubt has become familiar to laymen throughout our society and ordinarily does not need embellishment by a court. As Judge Posner has noted, "deeply entrenched in the popular culture as it is, the term 'beyond a reasonable doubt' may be the single legal term that jurors understand best." *United States* v. *Hall*, 854 F.2d 1036, 1044 (7th Cir. 1988) (concurring opinion). Professor McCormick has made the same observation, stating that "[r]easonable doubt is a term in common use almost as familiar to jurors as to lawyers." 2 C. McCormick, *Evidence* § 341, at 447 (J. Strong ed. 4th ed. 1992).

The American Law Institute did not define reasonable doubt in the Model Penal Code, because it be-

[5] In addition, the relevant statements in *Friedman* and *Williams* are dicta, *Nanfito* and *Blatt* also relied on other bases for reversal, and *Schencks* is no longer good law. See page 8, note 4, *supra*. And, in any event, none of the early decisions cited above expressly based their analysis on the Constitution—as opposed to the federal common law governing jury instructions—so those decisions offer little by way of enlightenment regarding the requirements of due process.

lieved that definition of the standard "can add nothing helpful to the phrase." Model Penal Code § 1.12, Comment 190 (1985). Dean Wigmore likewise condemned the practice of giving elaborate definitions of reasonable doubt as "a useless one" that "should be abandoned." J. Wigmore § 2497, at 408-409.[6] See also, *e.g.*, *United States* v. *Ivic*, 700 F.2d at 69 (Friendly, J.) ("a century's experience has confirmed the wisdom of the Supreme Court's observation" in *Miles* that reasonable doubt definitions are unhelpful); C. McCormick § 341, at 447 ("It is an ancient maxim that all definitions are dangerous.").[7] Under

[6] Dean Wigmore explained: "[W]hen anything more than a simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be rather confusion, or, at the least, a continued incomprehension. In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge. The effort to perpetuate and develop these elaborate unserviceable definitions is a useless one, and serves today chiefly to aid the purposes of the tactician. It should be abandoned." J. Wigmore § 2497, at 406-409.

[7] There is no consensus in the psychological literature about the impact of reasonable doubt instructions upon jury verdicts. See Kerr, Atkin, Stasser, Meek, Holt & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psychology 282, 291 (1976) ("mock jurors' verdicts may indeed be affected by a judge's instructions concerning reasonable doubt"). But see Cornish & Sealy, *Juries and the Rules of Evidence*, 1973 Crim. L. Rev. 208, 222 (variations in reasonable doubt instructions had "little effect" upon

these circumstances, it cannot be said that a trial court's decision not to instruct the jury on the meaning of reasonable doubt violates any principle fundamental to the fair operation of a criminal justice system under our Constitution.

B. The Due Process Clause Tolerates A Range Of Definitions Of "Reasonable Doubt"

Since the Due Process Clause does not require courts to define reasonable doubt for a jury, it follows that there is no single definition that is constitutionally required. At the same time, the Due Process Clause does not forbid trial courts from defining a reasonable doubt; the history discussed above shows that there has never been a consensus that it is improper for trial courts to define reasonable doubt for the jury. We submit, therefore, that when a trial court instructs a jury as to the meaning of reasonable doubt, the court may select from a broad range of acceptable definitions. See C. McCormick § 341, at 447 (a reasonable doubt definition is proper if "in terms *locally approved*.") (emphasis added); *Becher* v. *United States*, 5 F.2d 45, 51 (2d Cir. 1924) (L. Hand, J.) ("It is enough if it appears that the jury has been told that the prosecu-

simulated jury verdicts). Compare also Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc'y Rev. 153, 189-191 (1982) (instructions improved juror comprehension, but not application, of reasonable doubt standard); Kramer & Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J.L. Ref. 401, 414 (1990) (instructions "did little" to improve juror understanding of certain aspects of the meaning of reasonable doubt).

tion must establish all the facts to the required degree of satisfaction of the jury, and there is no fixed way in which this need be communicated, so long as that idea is evident."), cert. denied, 267 U.S. 602 (1925). We believe that the Constitution requires only that, "taken as a whole, the instructions correctly convey[] the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U.S. at 140.

Many attempts have been made to define reasonable doubt. The most famous and influential early attempt appeared in *Commonwealth* v. *Webster*, 59 Mass. (5 Cush.) 295, 320 (1850), where Chief Justice Shaw defined a reasonable doubt as follows:

> [W]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not a mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. * * * [T]he evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt * * *.

Over the years since then, this Court has recited or approved a variety of formulations defining reasonable doubt. In *Jackson* v. *Virginia*, 443 U.S. at 317, the Court said that "[a] 'reasonable doubt,' at

a minimum, is one based upon 'reason.'" Accord *Johnson* v. *Louisiana*, 406 U.S. 356, 360 (1972). In *Hopt* v. *Utah*, *supra*, the charge to the jury stated that "a reasonable doubt is a doubt based on reason" and that the defendant should be found not guilty "upon any reasonable hypothesis consistent with the defendant's innocence." 120 U.S. at 439. The charge also told the jury that if "you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt." *Ibid.* The Court upheld that jury instruction, calling it "as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence they should do so." *Id.* at 441. The Court specifically approved the "own affairs" portion of the instruction. See *id.* at 439.

In *Dunbar* v. *United States*, *supra*, the trial court told the jury, "I will not undertake to define a reasonable doubt further than to say that a reasonable doubt is not an unreasonable doubt—that is to say, by a reasonable doubt you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you upon the strong probabilities of the case, and the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt." 156 U.S. at 199. Of that instruction, this Court stated that "it gave all the definition of reasonable doubt which a court can be

required to give, and one which probably made the meaning as intelligible to the jury as any elaborate discussion of the subject would have done." *Ibid.*

The Court upheld another instruction in *Holland* v. *United States*, *supra*. There, the trial court instructed the jury that reasonable doubt is "the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon." 348 U.S. at 140. Although this Court was of the view that "the charge should have been in terms of the kind of doubt that would make a person hesitate to act," *ibid.*, it concluded that "the instruction as given was not of the type that could mislead the jury into finding no reasonable doubt when in fact there was some." *Ibid.*[5]

Several federal courts of appeals have adopted pattern jury instructions defining the term "reasonable doubt." The pattern instructions adopted by the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits are reprinted in the appendix to this brief. Although the District of Columbia Circuit has noted with approval the practice of not defining a reasonable doubt for the jury, *United States* v. *Taylor*, 997 F.2d 1551, 1557-1558 (D.C. Cir. 1993), that court also has approved the use of the District of Columbia's Criminal Jury Instructions; that jury instruction also is reprinted in the attached appendix.

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[5] In *Taylor* v. *Kentucky*, 436 U.S. 478, 488 (1978), the Court criticized a trial court's definition of reasonable doubt as "a substantial doubt, a real doubt." Calling that definition "truncated," "confusing," and "hardly a model of clarity," the *Taylor* Court nonetheless allowed that the instruction was "perhaps not in itself reversible error." *Ibid.* The adequacy of the trial court's definition of reasonable doubt, however, was not at issue in *Taylor*.

The pattern instructions adopted by the courts of appeals differ somewhat from one to the next, but there has been no suggestion by this Court or any of the courts of appeals that only one formulation is permissible and the others constitute reversible error. To the contrary, whether following pattern instructions or acting on their own, trial courts have traditionally been given wide latitude to define "reasonable doubt," and the courts of appeals have repeatedly rejected challenges to varying definitions of that term. See, *e.g.*, *United States* v. *Edelin*, 996 F.2d 1238, 1242-1243 (D.C. Cir. 1993) (not "a speculation or suspicion"); *United States* v. *Dale*, 991 F.2d 819, 853 (D.C. Cir.) ("a doubt for which you can give a reason"), cert. denied, 114 S. Ct. 286 (1993); *Watkins* v. *Ponte*, 987 F.2d 27, 31-32 (1st Cir. 1993) (not "foolish" or "fanciful" doubt); *United States* v. *Daniels*, 986 F.2d 451, 457 (11th Cir. 1993) ("a real doubt"); *United States* v. *Harris*, 974 F.2d 84, 85 (8th Cir. 1992) ("not the mere possibility of innocence"); *United States* v. *Polan*, 970 F.2d 1280, 1286 (3d Cir. 1992) (an "honest doubt" and "not a fanciful doubt"), cert. denied, 113 S. Ct. 1367 (1993); *United States* v. *Barrera-Gonzales*, 952 F.2d 1269, 1273 (10th Cir. 1992) ("a real possibility that [the defendant] is not guilty"); *Gaskins* v. *McKellar*, 916 F.2d 941, 952 (4th Cir. 1990) ("a substantial doubt" not "some imaginary doubt or some slight doubt"), cert. denied, 111 S. Ct. 2277 (1991); *Leecan* v. *Lopes*, 893 F.2d 1434, 1443 (2d Cir.) ("a doubt for which a reasonable man can give a valid reason" and "one founded on the evidence"), cert. denied, 496 U.S. 929 (1990); *United States* v. *Jorge*, 865 F.2d 6, 10 (1st Cir.) ("not a doubt suggested by the ingenuity of counsel"), cert. denied, 490 U.S. 1027

(1989); *United States* v. *Hall*, 854 F.2d 1036, 1038-1039 (7th Cir. 1988) (a "fair doubt as one 'based on reason and common sense'"); *Smith* v. *Bordenkircher*, 718 F.2d 1273, 1276-1277 (4th Cir. 1983) (a "good and substantial doubt" not "a mere vague, fanciful or imaginary doubt"), cert. denied, 466 U.S. 976 (1984); *United States* v. *Regilio*, 669 F.2d 1169, 1178 (7th Cir.) ("a doubt that is based on reason"), cert. denied, 457 U.S. 1123 (1982); *Bumpus* v. *Gunter*, 635 F.2d 907, 910 (1st Cir. 1980) ("a doubt in your mind that you can stand up in the jury room and argue with principle and integrity to your fellow jurors"), cert. denied, 450 U.S. 1003 (1981).

The wide range of instructions that have been upheld against constitutional challenge demonstrates that due process does not require the adoption of a single fixed model instruction on reasonable doubt, and that, in fact, the Due Process Clause permits the use of any formulation that does not manifestly undermine the level of firm confidence that jurors must have before they may find a fellow citizen guilty of a crime.

C. This Court's Decision in *Cage* v. *Louisiana* Does Not Require Reversal Of The Judgments Below

The petitioners in both *Victor* and *Sandoval* rely heavily on the Court's 1990 per curiam decision in *Cage* v. *Louisiana*, 498 U.S. 39, as the basis for reversal. In *Cage*, the jury was instructed that a reasonable doubt was "such doubt as would give rise to a grave uncertainty," that a reasonable doubt was "an actual substantial doubt," and that what was necessary to convict the defendant was a "moral

certainty" of his guilt. *Id.* at 40.[a] This Court reversed Cage's conviction, determining that "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41. The Court's decision in *Cage* does not control these cases, however, for several reasons.

1. The instructions given in these two cases have in common with the instruction given in *Cage* the use of the term "moral certainty" as part of the definition of reasonable doubt. *Cage*, however, should not be read to hold that a reference to "moral certainty," by itself, renders a reasonable doubt instruction unconstitutional. The primary culprit in the jury instruction denounced in *Cage* was the equation of "reasonable doubt" with "substantial doubt" and "grave uncertainty." 498 U.S. at 41 ("It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard."). The reference to "moral certainty" was criticized because it operated in conjunction with the references to substantial and

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[a] The instruction in *Cage* defined a reasonable doubt as

> "one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*"

498 U.S. at 40 (quoting 554 So. 2d 39, 41 (La. 1989); emphasis added by this Court).

grave doubt. *Ibid.* ("When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear" that the instruction violates due process).

Reference to "moral certainty" has long been a standard component of jury instructions defining the concept of reasonable doubt. The use of that term, without more, has not been thought to suggest to the jury that the government has a reduced burden of proof. In fact, in common parlance a level of confidence "to a moral certainty" would ordinarily be viewed as even more exacting than a level of confidence "beyond a reasonable doubt." The use of the term "moral certainty" in defining reasonable doubt therefore does not *ipso facto* violate due process.

During the 18th and 19th centuries, the term "moral certainty" came to mean that, in the realm of human affairs, absolute certainty is not attainable. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 Hastings L.J. 153, 192 (1986) ("Thus by the late eighteenth century the concepts of moral certainty and proof beyond a reasonable doubt were tightly linked together in the philosophical literature, in the legal treatises, and in discussions of law designed to reach the educated public."); Morano, 55 B.U.L. Rev. at 512. The influential 1850 decision by Chief Justice Shaw of the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Webster*, *supra*, referred to "moral certainty" to express a very high degree of confidence, but less than absolute certainty. See also *Donnelly* v. *State*, 26 N.J.L. 601, 615 (1857); *State* v. *Hammonds*, 85 S.E.2d 133, 138 (N.C. 1954).

As the *Webster* case illustrates, jurists in the 19th century came to regard the phrases "to a moral certainty" and "beyond a reasonable doubt" as synonymous. See *Fidelity Mutual Life Ass'n* v. *Mettler*, 185 U.S. 308, 317 (1902) ("[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt' "); *Hopt* v. *Utah*, 120 U.S. at 440 (same). Nor has the term lost that meaning in its modern usage. See *Schneble* v. *Florida*, 405 U.S. 427, 431 (1972) (equating "to a moral certainty" with "beyond a reasonable doubt" as a standard of guilt). This Court recently used the term "moral certainty" to denote a very high level of confidence. *City of Canton* v. *Harris*, 489 U.S. 378, 390 n.10 (1989); *McCleskey* v. *Kemp*, 481 U.S. 279, 308 n.29 (1987); see also *Brewer* v. *Williams*, 430 U.S. 387, 433-434 (1977) (White, J., dissenting).

This Court's precedents reflect and confirm the historical acceptance of the use of the term "moral certainty" in reasonable doubt instructions. In *Miles* v. *United States*, the Court reviewed a charge using the term "moral certainty." 103 U.S. at 309. The Court sustained that instruction, saying that "[t]he language used * * * was certainly very favorable to the accused, and is sustained by respectable authority." *Id.* at 312. In *Wilson* v. *United States*, 232 U.S. 563 (1914), the defendants objected to the trial court's definition of reasonable doubt in terms of moral certainty. See *id.* at 569-570. The trial court instructed the jury that, *id.* at 570:

> "[R]easonable doubt is that frame of mind which forbids you to say, all the evidence considered and weighed, 'I have an abiding conviction of the defendants' guilt' or as it has been

> expressed, 'I am convinced of the defendants' guilt to a moral certainty.' If you can say that you have such a conviction, then you have no reasonable doubt, and your verdict should be guilty. On the contrary, if that is your frame of mind, if you are in the frame of mind where if it was a matter of importance to you in your own affairs, away from here, you would pause and hesitate, before acting, then you have a reasonable doubt."

This Court upheld that instruction, stating that "[t]he argument here is that the instruction as given is faulty, because the court did not tell the jury that the Government must prove its case against defendants beyond a reasonable doubt. As we read the charge, it meant nothing less than that, and was sufficiently favorable to defendants." *Ibid.* See also *Perovich* v. *United States*, 205 U.S. 86, 92 (1907) (approving the instruction given in *Commonwealth* v. *Webster*, *supra*); *Agnew* v. *United States*, 165 U.S. 36, 51 (1897) (quoting, with apparent approval, an instruction defining reasonable doubt as "such a doubt arising from the evidence that leaves the minds of the jury in such a state that they cannot say, after having reviewed all the evidence, that they have an abiding conviction, to a moral certainty, of the guilt of the accused").

2. If it is constitutionally permissible to use the phrase "moral certainty" to define reasonable doubt, the judgment in *Sandoval* v. *California*, No. 92-9049, should be affirmed. The jury instruction in that case used the phrase "moral certainty," but not in conjunction with the other terms that this Court found fatal to the instruction given in *Cage*. The *Sandoval* jury instruction is therefore consistent with this Court's decisions in cases such as *Miles*, *Hopt*, and

Wilson, and is not rendered constitutionally invalid under this Court's analysis in *Cage*.

The jury instruction in *Victor* v. *Nebraska*, No. 92-8894, more closely resembles the one given in *Cage*. Nonetheless, a close reading of the instructions in those two cases reveals two critical differences. First, the instruction in *Victor* did not refer to reasonable doubt as requiring "grave uncertainty," as did the jury charge in *Cage*. That distinction is an important one. Requiring jurors to convict unless they entertain a "grave uncertainty" about a defendant's guilt is likely to persuade the jury that more than a "'doubt' * * * based upon 'reason,'" *Jackson* v. *Virginia*, 443 U.S. at 317, is necessary to return a not guilty verdict.

Second, while the jury charge in *Victor* contained the "actual and substantial doubt" phrase used in the *Cage* jury charge, the instruction in *Victor* did not use that phrase independently. Rather, the jury instruction in *Victor* referred to "an actual and substantial doubt" only as part of a sentence that drew a contrast between such a doubt and one "arising from mere possibility, from bare imagination, or from fanciful conjecture." The context in which the phrase "actual and substantial doubt" was used is important. A lawyer might interpret the term "substantial" as referring to the "substantial evidence" standard that is commonly used in administrative law, see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), but lay jurors are not likely to interpret the term in that manner. Instead, they are likely to construe the term "substantial," in the context of the *Victor* instruction, as referring to a doubt based on the evidence of record, because that term was contrasted with a doubt "arising from mere possibility, from

bare imagination, or from fanciful conjecture." So construed, the instruction in *Victor* does not run afoul of the Court's decision in *Cage*.

3. Finally, the Court's analysis in *Cage* may have been affected by what the Court has subsequently recognized as an incorrect standard of review. During the Term before *Cage* was decided, this Court in *Boyde* v. *California* 494 U.S. 370, 378-381 (1990), adopted a standard for reviewing jury instructions. The proper inquiry, the Court held, is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in" an unconstitutional manner. *Id.* at 380. In so ruling, the Court expressly rejected use of the standard applied in *Francis* v. *Franklin*, 471 U.S. 307 (1985), which asked whether a jury "could have" misapplied the instructions. 494 U.S. at 378. In *Cage*, however, the Court applied the standard of review that it had first articulated in *Francis*, but then had later rejected in *Boyde*. 498 U.S. at 41 ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. *Francis* v. *Franklin*, 471 U.S. 307, 316 (1985)."). The Term after *Cage*, the Court recognized that it had applied the wrong standard of review in that case, and it reaffirmed that the standard of review articulated in *Boyde* is the correct one. *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 n.4 (1991). Thus, particularly when the instructions in these cases are analyzed under the proper standard of review, *Cage* cannot be said to require reversal of petitioners' convictions.

CONCLUSION

The judgments of the Supreme Court of Nebraska and the Supreme Court of California should be affirmed.

Respectfully submitted.

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APPENDIX

Several courts of appeals have pattern jury instructions defining the reasonable doubt standard. The Fifth Circuit's definition is as follow:

> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

U.S. Fifth Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* 1.06 (1990). See also *United States* v. *Alonzo*, 681 F.2d 997 (5th Cir.), cert. denied, 459 U.S. 1021 (1982) (approving that instruction).

The Sixth Circuit's definition is as follows:

> (4) * * * Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. * * *
>
> (5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. * * *

U.S. Sixth Circuit District Judges Ass'n, *Pattern Criminal Jury Instructions* 1.03 (1991). See also *United States* v. *Goodlett*, 3 F.3d 976, 979 (6th Cir. 1993) (expressing approval of that instruction).

The Eighth Circuit's definition is as follows:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 3.11 (1922).

The Ninth Circuit's definition is as follows:

> A reasonable doubt is a doubt based upon reason and common sense, * * *. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

Manual of Model Criminal Instructions for the Ninth Circuit 3.03 (1992).

The Eleventh Circuit's definition is as follows:

> A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case.
>
> Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your affairs.

U.S. Eleventh Circuit District Judges Ass'n, *Pattern Jury Instructions, Criminal Cases* 3 (1985). See also *United States* v. *Daniels*, 986 F.2d 451, 456 (11th Cir. 1993) (upholding instruction that "closely tracks" this language). The Eleventh Circuit's definition is identical to the Fifth Circuit's with the exception of the word "real" before "doubt" in the first sentence.

According to the District of Columbia's "Red Book":

> Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. It is such doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

Young Lawyers Section of the Bar Association of the District of Columbia, *Criminal Jury Instructions* 2.09 (3d ed. 1978). See also *United States* v. *Dale*, 991 F.2d 819, 853 (D.C. Cir.) (upholding use of that instruction), cert. denied, 114 S. Ct. 286 (1993).

The leading treatise on federal jury instructions defines reasonable doubt as follows:

> It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt

> based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

1 E. Devitt, C. Blackmar, M. Wolff & K. O'Malley, *Federal Jury Practice and Instructions* § 12.10, at 354 (4th ed. 1992).

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IN THE

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OCTOBER TERM, 1993

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

CLARENCE VICTOR, *Petitioner*,

vs.

THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

On Writs of Certiorari to the Supreme Courts of the States of California and Nebraska

---

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Did *Cage* v. *Louisiana*, 498 U. S. 39 (1990) extend the Due Process Clause so much that the California and Nebraska reasonable doubt instructions are unconstitutional?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*,

---- AND ----

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THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondents in the above-captioned cases. Counsel for petitioner Sandoval has refused consent; counsel for all other parties have consented.

In the accompanying brief, *amicus curiae* argues that the California and Nebraska reasonable doubt instructions do not violate due process.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present cases present the question of the continued validity of reasonable doubt instructions used in California and Nebraska. Overturning these instructions would require an unnecessary expansion of the Due Process Clause and would severely disrupt the criminal justice systems of several states. This needless disruption is contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

December, 1993

Respectfully submitted,

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vs.

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THE PEOPLE OF THE STATE OF NEBRASKA, *Respondent*.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

SUMMARY OF FACTS AND CASE

Petitioner Sandoval in No. 92-9049 was convicted on four counts of first degree murder with a multiple-murder special circumstance finding. See *People* v. *Sandoval*, 4 Cal. 4th 155, 167-168, 841 P. 2d 862, 866 (1992). The jury returned a verdict of death for one killing and verdicts of life without possibility of parole for the three other murders. *Id.*, at 168, 841 P. 2d, at 866. The jury was given an instruction substantially similar to the standard jury instruction on reasonable doubt, CALJIC 2.90.[1] See

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1. See Appendix for the text of CALJIC 2.90.

Opp., at 5, n. 2. The California Supreme Court affirmed Sandoval's convictions and sentence. See *id.*, at 198, 841 P. 2d, at 886.

Petitioner Victor in No. 92-8894 was convicted of first degree murder and use of a weapon to commit a felony for killing 82-year-old Alice Singleton. He was sentenced to death for the murder. *State* v. *Victor*, 494 N. W. 2d 565, 568 (Neb. 1993). His jury was given essentially the same reasonable doubt instruction that was approved by the Nebraska Supreme Court in *State* v. *Morley*, 474 N. W. 2d 660 (Neb. 1991).[2] *Victor*, *supra*, 494 N. W. 2d, at 569. Relying on *Morley*, the Nebraska Supreme Court rejected Victor's challenge to the reasonable doubt instruction. *Ibid*.

SUMMARY OF ARGUMENT

Because due process arguments have great potential for needless interference in state criminal procedure, this Court has been very reluctant to expand the guarantee. Instead, this Court has traditionally deferred to the state's primacy in criminal law.

This deference was reaffirmed in *Medina* v. *California*, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). *Medina* established that a procedure that is not contrary to established practice will not violate due process unless it is fundamentally unfair. As few practices are so egregious as to be fundamentally unfair, the vast majority will not violate the Due Process Clause.

The California and Nebraska reasonable doubt instructions are sanctioned by history and are not fundamentally unfair. The California instruction is taken from the landmark case in the modern definition of reasonable doubt. This definition of reasonable doubt has been

2. See Appendix for the text of the *Morley* instruction.

consistently popular with the states and has been approved by this Court. The Nebraska instruction is composed of similarly acceptable parts. Voiding these traditional instructions would be a particularly excessive expansion of due process.

Recent treatment of the instructions supports their constitutionality. They are still popular in several states, and the criticism of them has been primarily of a practical, not constitutional, nature.

Nor are these instructions fundamentally unfair. These long-respected procedures are not the egregious practices that fundamental fairness protects against. They are the good faith efforts of two states to define reasonable doubt. Due process requires no more.

Cage v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)* does not change the analysis. Neither instruction contains any reference to "grave uncertainty," the phrase that was key to the *Cage* decision. While the California and Nebraska instructions do contain language that was criticized in *Cage*, this language was used in a different context than what was condemned in *Cage*. Finally, the standard of review for jury instructions employed by *Cage* has been subsequently rejected by this Court.

This Court should be particularly hesitant to interfere with a state's definition of reasonable doubt. If this Court strikes down the two instructions before it, then there will be a great demand for this Court to supply an approved definition of reasonable doubt. Unfortunately, no clearly superior alternative standard exists. This Court should therefore avoid announcing a standard, because it would stifle innovation and prevent the states from developing the best standard. Finally, undue interference with state reasonable doubt instructions is too close to constitutionalizing the law of evidence, a development this Court must avoid.

ARGUMENT

I. State criminal procedures that conform with traditional practices are due great deference under the Due Process Clause.

A. Tradition of Deference.

"Due process" is a potentially loaded term. Because it does not state what specific processes are due, it could be misinterpreted to burden the states with virtually any procedure. Such pervasive federal control of criminal procedure violates a basic principle of federalism, that preventing and dealing with crime is primarily a state matter. See *Patterson* v. *New York*, 432 U. S. 197, 201 (1977).

Thus, "the Due Process Clause has never been perverted so as to force upon the . . . States a uniform code of criminal procedure." *Carter* v. *Illinois*, 329 U. S. 173, 175 (1946). Instead, "[u]nder our constitutional system, the primary responsibility for defining crimes against state law, fixing punishments for commission of these crimes, and establishing procedures for criminal trials rests with the States." *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 734, 111 S. Ct. 2597, 2607 (1991).

This still leaves the problem of how to protect state criminal procedure from unduly expansive interpretations of the Due Process Clause. One way to limit the reach of due process would be to judge state procedures against the common law. The advantage of using the common law is that what process was due is relatively well known, thus limiting the reach of the clause. Unfortunately, this is too restrictive on the states. Preventing the states from departing from the common law would stifle criminal procedure, preventing much of the experimentation that is so vital to federalism. Thus *Hurtado* v. *California*, 110 U. S. 516 (1884) allowed California to use a preliminary hearing instead of the common law indictment because states must be given the freedom to develop their own

procedures. The Due Process Clause of the Fourteenth Amendment

> "refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and *the greatest security for which resides in the right of the people to make their own laws*, and alter them at their pleasure." *Id.*, at 535 (emphasis added).

At the heart of this argument is the idea that this Court cannot impose a particular procedure upon the states simply because it believes that its procedure is better. A state procedure "does not run foul of the Fourteenth Amendment because another method may seem to [this Court's] thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105 (1934). Instead, a state "is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in doing so it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as *fundamental*." *Ibid.* (emphasis added).

The incorporation doctrine has narrowed the scope of *Snyder*. Its statements about self-incrimination and jury trial, see *ibid.*, are no longer true. See *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968). But incorporation, if anything, strengthens the case for limiting the scope of procedural due process. The incorporation of most of the Bill of Rights gives state defendants many specific protections. As the Bill of Rights has become more and more like a national code of criminal procedure, see Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 155-156 (1970), there is even less need for expansive interpretations of the Due Process Clause. See

Dowling v. *United Sta'es*, 493 U. S. 342, 352 (1990). A corollary to this development is that modern claims under due process are less likely to invoke specific rights, but instead rely on much more ephemeral claims of general unfairness. Thus this Court today has even less reason for expanding due process.

Justice Harlan affirmed this development in his opinion for this Court in *Spencer* v. *Texas*, 385 U. S. 554 (1967). "In the procedures before us, in contrast, no specific federal right . . . is involved; reliance is placed solely on a general 'fairness' approach. In this area the Court has always moved with caution before striking down state procedures." *Id.*, at 565. Instead of adopting its own code of fairness, this Court has instead deferred to state judgments, choosing to limit its discretion under the Due Process Clause. See *Leland* v. *Oregon*, 343 U. S. 790, 799 (1952).

B. Medina v. California.

The tradition of deference to state criminal procedure was reaffirmed in *Medina* v. *California*, 120 L. Ed. 2d 353, 112 S. Ct. 2572 (1992). The *Medina* Court rejected the balancing test that had been developed for administrative law in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976) and adopted the traditional deference to state criminal procedure enunciated in *Patterson* v. *New York*, 432 U. S. 197 (1977). *Medina*, *supra*, 120 L. Ed. 2d, at 361, 112 S. Ct., at 2576-2577.

The *Patterson* Court had rejected a due process challenge to New York's placement of the burden of proof of the affirmative defense of extreme emotional disturbance on defendant. This decision was bottomed on the tradition of deference to state courts in criminal matters. See *Patterson*, *supra*, 424 U. S., at 201. Given its decision not to interfere with the state procedure "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked

as fundamental,' " *id.*, at 202 (quoting *Speiser* v. *Randall*, 357 U. S. 513, 523 (1958)), the *Patterson* Court had to find some substitute for a simple balancing of interests. Deference to historically accepted procedures achieved the twin goals of placing a limit on any open-ended guarantees of fairness while at the same time preserving those rights that are worthy of being called fundamental.

Thus, it was important to the *Patterson* Court that New York's severe emotional disturbance defense was simply "an expanded version of the common-law defense of heat of passion on sudden provocation . . . ." *Id.*, at 202. The burden of proving this and other affirmative defenses was traditionally on the defendant, both at the common law and when the Fifth and Fourteenth Amendments were passed. *Id.*, at 202. History was thus able to define the limits of the aphorism "that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U. S. 358, 372 (1970) (Harlan, J., concurring). "Proof of the non-existence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case . . . ." 432 U. S., at 210.

Medina reaffirms this tradition of deference to established practices. "[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area." *Medina*, *supra*, 120 L. Ed. 2d, at 363, 112 S. Ct., at 2577. This approach, approved in *Patterson*, "is thus far less intrusive than that approved in *Mathews*," *ibid.*, which involved balancing the individual's against the government's interests in the challenged procedure. See *Mathews*, *supra*, 424 U. S., at 335.

The *Medina* Court's decision to adopt the narrower interpretation of the Due Process Clause hinged upon the incorporation doctrine.

> "The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina*, *supra*, 120 L. Ed. 2d, at 362, 112 S. Ct., at 2576.

The *Medina* Court first limited the scope of the Due Process Clause by looking to the historical basis of the proposed constitutional rule. If a rule is " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " *id.*, at 363, 112 S. Ct., at 2577 (quoting *Patterson*, *supra*, 432 U. S., at 202), then it should be part of a long and commonly accepted practice and thus protected under due process. Where the constitutional rule proposed by defendant is not part of a settled tradition, then the challenged state practice is on a much stronger footing. See 120 L. Ed. 2d, at 364, 112 S. Ct., at 2578. A state procedure's worthiness could be further enhanced by looking to current practice. While "of limited relevance to due process inquiry," if the constitutional rule proposed by defendant does not have at least substantial contemporary acceptance there is little reason to believe that the proposed rule is fundamental. *Ibid*.

If the challenge to the state procedure has no basis in history, then the only alternative is an appeal to fundamental fairness. The *Medina* Court recognizes that a historically valid practice may nonetheless be unconstitutional if it "transgresses any recognized principle of 'fundamental fairness' in operation." *Id.*, at 365, 112 S. Ct., at 2578. This Court did not need to explain exactly what constituted a fundamentally unfair procedure because of the weakness of Medina's claim.

Medina claimed that it violated due process for California to place on defendant the burden of proof that

he is incompetent to stand trial. *Id.*, at 359, 112 S. Ct., at 2574. As allocating the burden neither required defendant to disprove any elements of the crime nor rewarded the government for any impropriety, "it [was] not difficult to dispose of petitioner's challenge to the presumption of competence . . . ." *Id.*, at 367, 112 S. Ct., at 2581. Therefore, the *Medina* Court did not have to explore the parameters of fundamental fairness.

Given the deference due to state procedures under the Due Process Clause, a rule guaranteeing fundamental fairness must be narrow. "[F]airness is a relative, not an absolute concept." *Snyder* v. *Massachusetts*, 291 U. S. 97, 116 (1934). Therefore, "what is fair in one set of circumstances may be an act of tyranny in others." *Id.*, at 117. Any standard that is as potentially subjective as fairness must be narrowly construed in order to avoid swallowing up the traditional deference to state criminal procedure.

Mere disagreement with a state procedure is not enough to render it fundamentally unfair. See *Johnson* v. *Louisiana*, 406 U. S. 356, 362 (1972). The definition of fundamental fairness

> "is best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) (footnotes omitted).

These cases deal with procedures or trials that undermine the basic integrity of the trial. The three cases cited in the *Lundy* dissent—*Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); and *Brown* v. *Mississippi*, 297 U. S. 278 (1936)—represent the worst types of abuses found in the history of American criminal procedure and are mercifully rare.

If a procedure does not violate a specific federal right, is not contrary to a traditional right, and does not critically undermine the trial, then it does not violate due process. The incorporated Bill of Rights and the many protections provided by state law provide state defendants with enough protection that it is unnecessary to turn due process into a code of criminal procedure.

II. Neither instruction abrogates any traditional right, and neither is fundamentally unfair.

A. History.

The strongest argument in favor of the constitutionality of the California and Nebraska instructions is their history. The California instruction, CALJIC 2.90, is taken from one of the landmark cases in American criminal law, *Commonwealth* v. *Webster*, 5 Cush. (59 Mass.) 295, 320 (1850). See 5 B. Witkin and N. Epstein, California Criminal Law § 2652, at 3184 (2d ed. 1989). *Webster* began the application of reasonable doubt "in its modern form in criminal cases." *Apodaca* v. *Oregon*, 406 U. S. 404, 412, n. 6 (1972) (plurality). An attack on CALJIC 2.90 is thus an attack on the foundation of modern reasonable doubt law.

Petitioner Sandoval attempts to distinguish the California instruction from that given in *Webster*. He notes that the instruction read in *Webster* contains additional language on the burden of proof and the need to prove each fact beyond a reasonable doubt. See Petitioner's Brief, at 38-39. This no more than faint praise in light of the assault petitioner makes on the rest of *Webster*. Sandoval asserts that the California "instruction consists of a passage extracted from *Commonwealth* v. *Webster*, each component of which conveys an improper meaning to the jury in current parlance. While the passage—at the time it was penned—conveyed a meaning consistent with the core concept of proof beyond a reasonable doubt, the

meaning presently conveyed is a *gross deviation* from that core concept." *Id.*, at 37 (emphasis added).

This is a dagger thrust at the heart of the *Webster* instruction. No amount of further instruction could save a "gross deviation" from the definition of reasonable doubt. The passage from *Webster* that was adopted by California was, and still is, considered to be the heart of the *Webster* definition of reasonable doubt. See F. Wharton, Wharton's Criminal Evidence § 1, at 2-3 (9th ed. 1884); J. Strong, McCormick on Evidence § 341, at 577 (4th ed. 1992). Sandoval's attack on CALJIC 2.90 is an attack on *Webster*.

The reasonable doubt standard is derived from the presumption of innocence, a principle with roots reaching at least as far back as Roman law, and possibly back to the Old Testament. See *Coffin* v. *United States*, 156 U. S. 432, 453-454 (1895). Reasonable doubt is of much more recent vintage. The earliest use of reasonable doubt is believed to be a 1798 high treason case tried in Dublin. See *Apodaca*, *supra*, 406 U. S., at 412, n. 6. There was a fair amount of confusion over when and how to apply the reasonable doubt standard until the *Webster* decision ushered in the modern age. See *ibid*.

Webster was recognized as the leading definition of reasonable doubt during the period after the ratification of the Fourteenth Amendment. The treatise writers of the day saw *Webster* as the authoritative definition of reasonable doubt. See Wharton's, *supra*, § 1, at 2-3; H. Kelley, Criminal Law and Practice § 374, at 199 (1876). Many states also adopted *Webster*. See, *e.g.*, *Williams* v. *State*, 52 Ala. 411, 413 (1875); *Donnelly* v. *State*, 2 Dutch. (26 N. J.) 601, 615 (1857); *State* v. *Ostrander*, 18 Iowa 435, 459 (1865); *James* v. *State*, 45 Miss. 572, 575 (1871); *Billard* v. *State*, 30 Tex. 368, 373 (1867); *People* v. *Strong*, 30 Cal. 151, 155 (1866).

This Court has also accepted the *Webster* definition of reasonable doubt. In *Miles* v. *United States*, 103 U. S. 304

(1881) the trial court instructed the jury that " '[p]roof beyond a reasonable doubt' is such as will produce an abiding conviction in the mind to a *moral certainty* that the fact exists that is claimed to exist, so that you feel certain that it exists." *Id.*, at 309 (emphasis added). While the *Miles* Court felt that most attempts to define reasonable doubt were futile, see *id.*, at 312, it upheld this "moral certainty" definition. "The language used in this case, however, was certainly *very favorable to the accused*, and is sustained by *respectable authority*. *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295 . . . ." *Ibid.* (emphasis added); accord *Wilson* v. *United States*, 232 U. S. 563, 570 (1914).

Webster was also endorsed in *Perovich* v. *United States*, 205 U. S. 86 (1907). There, "this instruction [on reasonable doubt] is taken from the charge of Chief Justice Shaw to the jury in *Commonwealth* v. *Webster*, 5 Cush. 295, 320 . . . ." 205 U. S., at 92. This Court upheld the instruction, relying on the prior approval of *Webster* in *Miles*. See *ibid.*

The other early decision that addressed the *Webster* definition was *Hopt* v. *Utah*, 120 U. S. 430 (1887). The instruction at issue did not define reasonable doubt in terms of moral certainty, see *id.*, at 439, but the Court nonetheless noted the *Webster* definition of reasonable doubt, feeling that " 'to a reasonable and moral certainty' add[s] nothing to the words 'beyond a reasonable doubt' . . . ." *Id.*, at 440. The *Hopt* Court felt that in all but the more complicated cases, the best instruction may be to leave reasonable doubt undefined. *Id.*, at 440-441.

Given the approval of *Webster* in *Miles* and the subsequent support of *Miles* in *Perovich* and *Wilson*, this mildly critical dicta is not damning. Furthermore, *Webster* was not being criticized for restricting defendant's rights. The *Hopt* Court instead felt that *Webster* was not up to the task of keeping jurors from arriving at unsupported acquittals.

> "Out of the domain of the exact sciences and actual observation there is no absolute certainty. The guilt of the accused, in the majority of criminal cases, must necessarily be deduced from a variety of circumstances leading to proof of the fact. Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities." *Id.*, at 439-440.

The Nebraska definition of reasonable doubt uses moral certainty language similar to that found in *Webster* and also defines it as "such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." *State* v. *Morley*, 474 N. W. 2d 660, 669 (Neb. 1991). While not found in *Webster*, this phrase has a similarly strong background.

This analogy to "important transactions" had its own adherents in 19th century state courts, see, *e.g.*, *Arnold* v. *State*, 23 Ind. 170 (1864); *State* v. *Oscar*, 7 Jones (52 N. C.) 305 (1860), and received strong support from this Court. In *Miles*, *supra*, the trial court, in addition to using moral certainty language from *Webster*, further defined reasonable doubt as the level of belief so " 'that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.' " 103 U. S., at 309. This language was also approved by the *Miles* Court. See *id.*, at 312.

The *Hopt* Court gave even more explicit approval of this type of instruction. It noted that "an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion . . . ." *Hopt*, *supra*, 120 U. S., at 441.

Using the term "substantial" to help define reasonable doubt, while not as popular as the two definitions discussed above, was not contrary to the roots of reasonable doubt. In *Coffin* v. *United States*, 156 U. S. 432, 453 (1895) the trial court instructed the jury that "[a] reasonable doubt, as that term is employed in the administration of the criminal law, is an honest, *substantial* misgiving, generated by the proof or want of it." (emphasis added). This, and the rest of the reasonable doubt instruction, was held to be a complete instruction on reasonable doubt.[3] *Ibid*. If this term were fundamentally unfair, this Court would have invalidated the instruction in *Coffin*.

"Historical practice is probative of whether a procedural rule can be characterized as fundamental." *Medina* v. *California*, 120 L. Ed. 2d 353, 363, 112 S. Ct. 2572, 2577 (1992); see *Patterson* v. *New York*, 432 U. S. 197, 202 (1977); *In re Winship*, 397 U. S. 358, 361 (1970). The *Medina*, *Patterson*, and *Winship* Courts were using history to see if historical practice justified resorting to due process to impose a particular rule upon the states. "Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.' " *Winship*, *supra*, 397 U. S., at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968)).

Petitioners do not advance such a rule. Instead, the weight of history supports the language found in the California and Nebraska instructions. In *Medina*, the fact that it was unsettled whether history supported defendant's claim was enough to keep this Court from invoking due process to impose a new procedural burden on the state. See *Medina*, *supra*, 120 L. Ed. 2d, at 364, 112 S. Ct., at 2578. Here, where history favors the states' positions, the argument against extending due process is all the stronger.

3. The *Coffin* Court reversed the conviction because there was no additional instruction on the presumption of innocence. See *id*., at 461.

The argument against extending due process is made conclusive by this Court's treatment of the language used in the two instructions. Once this Court approves a practice, other jurisdictions that employ the same or similar practice should be able to rely on this Court's approval. While not infallible, this Court is final, see *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring), and state courts and legislatures have every reason to continue a practice that this Court has approved and has never overturned. Ignoring precedent and dashing these expectations can only diminish respect for the rule of law that is at the heart of *stare decisis*. See *Vasquez* v. *Hillery*, 474 U. S. 254, 265-266 (1986); *Planned Parenthood of SE Pa.* v. *Casey*, 120 L. Ed. 2d 674, 700, 112 S. Ct. 2791, 2808 (1992). Ignoring the approval found in *Miles*, *Wilson*, *Perovich*, and *Hopt* will diminish the rule of law.

This Court has usually confined upsetting state expectations in criminal procedure to extending the Bill of Rights to the states. There was usually strong historic precedent for such an extension and frequently a new right was imposed only after many states had adopted similar practices. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 651 (1961).

General due process, however, is another matter. Where no specific federal right is asserted, "the Court has always moved with caution before striking down state procedures." *Spencer* v. *Texas*, 385 U. S. 554, 565 (1967). As due process is so open-ended, this Court must be particularly careful not to upset state expectations. Therefore, this Court should not undo what it has already done.

B. Contemporary Practice.

"Contemporary practice, while of limited relevance to the due process inquiry," *Medina* v. *California*, 120 L. Ed. 2d 353, 364, 112 S. Ct. 2572, 2578 (1992), also favors the two instructions. "Moral certainty" is still accepted as a valid term for defining reasonable doubt by other jurisdictions. See, *e.g.*, *Smith* v. *State*, 588 So. 2d 561, 569 (Ala. Crim. App. 1991); *Commonwealth* v. *Beldotti*, 567 N. E. 2d 1219, 1225 (Mass. 1991); *State* v. *Williams*, 828 P. 2d 1006, 1018 (Or. 1992); *State* v. *Rhodes*, 822 P. 2d 960, 978 (Idaho 1991). While there has been minor constitutional criticism of "moral certainty," see *State* v. *Montgomery*, 417 S. E. 2d 742, 750 (N. C. 1992), the primary criticism of *Webster* is not that it *unconstitutionally* deprives defendant of a reasonable doubt instruction, but that it does not help to clarify what reasonable doubt means. See J. Strong, McCormick on Evidence § 341, at 577 (4th ed. 1992).

Even the most eloquent critic of California's reasonable doubt instruction did not assail it in constitutional terms. In *People* v. *Brigham*, 25 Cal. 3d 283, 599 P. 2d 100 (1979) Justice Stanley Mosk, while criticizing CALJIC No. 2.90 and Penal Code section 1096 extensively, concurred in the affirmance of a conviction where this instruction was used. Instead of dissenting on the ground that the reasonable doubt instruction was unconstitutional, he simply called upon the legislature to provide a superior solution to the problem of reasonable doubt. See *id.*, at 314, 599 P. 2d, at 120 (Mosk, J., concurring). Furthermore, this Court's last reference to *Webster* was favorable, noting that it ushered in the modern age of reasonable doubt. See *Apodaca* v. *Oregon*, 406 U. S. 404, 412, n. 6 (1972). "Moral certainty" is not a standard under sustained constitutional assault.

Nor have the states necessarily seen the word "substantial" as poisonous. In *Commonwealth* v. *Stokes*, 615 A. 2d 704, 709-710 (Penn. 1992) the Pennsylvania Supreme Court refused to invalidate a reasonable doubt instruction just because it used the word "substantial" to differentiate reasonable doubt from imagined doubt or passing fancy. See also *Smith* v. *State*, 588 So. 2d 561, 569 (Ala. Crim. App. 1991). In *Holland* v. *United States*, 348 U. S. 121, 140 (1954) this Court affirmed an instruction that stated that a reasonable doubt was a " 'substantial doubt, not a trivial doubt . . . .' " *Holland* v. *United States*, 209 F. 2d 516, 522 (CA 10 1954). While "substantial doubt" must now be used with care, see *Cage* v. *Louisiana*, 498 U. S. 39 (1990),[4] it has not required automatic reversal.

In any event, neither instruction is against the overwhelming weight of authority. Even if the bulk of authority was against them, that would not be enough to make them unconstitutional. See *Martin* v. *Ohio*, 480 U. S. 228, 235-236 (1987). Substantial approval, however, should significantly weigh in favor of the challenged state procedure. Due process only protects rules of fundamental fairness and it is difficult to see how a practice is fundamentally unfair if it has strong historic roots and continues to be observed in several jurisdictions.

C. Fundamental Fairness.

The Due Process Clause's guarantee of fundamental fairness is not an invitation for federal courts to meddle in state criminal procedure. This guarantee only protects the accused from the very worst practices. See Part I B, *ante*, at 6-10. The main source of federal protection is now the Bill of Rights. See *Dowling* v. *United States*, 493 U. S. 342, 352 (1990).

Reasonable doubt is fundamental to the fairness of the criminal trial. See *In re Winship*, 397 U. S. 358, 362-363 (1970). This requirement has roots deep in our constitutional history. See *id.*, at 362. The California and

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4. *Cage* will be addressed in Part III of this brief.

Nebraska instructions are an important part of this history. They have roots that stretch back to the first modern definition of reasonable doubt and have been widely used ever since. See Part II, *ante*, at 10-18. It would be a needless irony to strike down the roots of a requirement steeped in history.

Both instructions tell the jury that they cannot convict if they have a reasonable doubt. Neither definition of reasonable doubt negates this basic requirement. See Part III, *post*, at 18-22. Fundamental fairness can require no more. "In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, [this Court should] find it impossible" to declare these instructions fundamentally unfair. *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967).

III. *Cage* v. *Louisiana* does not render either instruction fundamentally unfair.

This Court's uninterrupted support for the language found in the California and Nebraska reasonable doubt instructions appeared to change in *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. *Cage*'s criticism of Louisiana's use of "moral certainty" and "substantial doubt" does not, however, change the mandate of history. These historically sanctioned instructions are not rendered invalid by this brief *per curiam* opinion. Careful analysis of the instruction struck down by *Cage*, this Court's subsequent treatment of that decision, and totality of the California and Nebraska instructions show that neither instruction is diminished by *Cage*.

Any analysis of *Cage* and its impact must begin with the instruction it struck down. The pertinent part read:

> " 'This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.' " *Id.*, at 40 (emphasis in original).

While three phrases struck the eye of the *Cage* Court, the first was by far the most serious. "Grave" is "1. [r]equiring serious thought; momentous; *a grave decision in a time of crisis*." American Heritage Dictionary 791 (3d ed. 1992) (emphasis in original). This is fundamentally incompatible with any possible definition of reasonable doubt. In effect, the trial court told the jury that it must convict the capital defendant *unless* it had a momentous doubt.

This gross inaccuracy has the effect of shifting the burden of proof to defendant. For the jury to have a "grave" doubt about defendant's guilt, it must feel that defendant's case was stronger than the prosecution's. This role reversal clearly violates due process.

The *Cage* Court did not stop there. It also stated that "substantial," like "grave," "suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.*, at 41. This, combined with the reference to moral certainty, made it "clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Ibid.*

This attack on the grossly inadequate instruction in *Cage* cannot be translated into a broader assault on the California and Nebraska instructions. The *Cage* decision uses a standard for analyzing jury instructions that has since been disapproved. In *Estelle* v. *McGuire*, 116 L. Ed. 2d 385, 399, n. 4, 112 S. Ct. 475, 482, n. 4 (1991)

this Court formally disapproved the "reasonable juror" standard employed in *Cage*, recognizing that *Boyde* v. *California*, 494 U. S. 370, 379-380 (1990) made "reasonable likelihood" the single standard for reviewing jury instructions. While the *Boyde* Court doubted that there was much difference between the various standards used to evaluate instructions, see *id.*, at 379, this opinion still places *Cage* in a different light.

It is no longer enough that a reasonable juror *could* have misapplied the reasonable doubt standard; there must now be a stronger, reasonable likelihood. This change embodies the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, *supra*, 494 U. S., at 380.

This places the California and Nebraska instructions in a different light. Although Nebraska refers to "substantial doubt," it does so in a much different context. The Louisiana instruction bluntly asserted that "A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*." *Cage*, *supra*, 498 U. S., at 40 (emphasis in original). Nebraska, however, takes a much more nuanced approach.

> "A reasonable doubt is an actual and substantial doubt *reasonably arising from the evidence*, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, *as distinguished from a doubt arising from mere possibility*, from bare imagination, or from fanciful conjecture." *Morley*, *supra*, 474 N. W. 2d, at 670 (emphasis added).

This is a different use of the term "substantial." The *Cage* instruction was using substantial to mean "[a]mple; sustaining . . . ." American Heritage Dictionary 1791 (3d ed. 1992). Nebraska, however, is using "substantial" to mean "[t]rue or real; not imaginary." *Ibid*. Because there is some doubt inherent in all human affairs, there is a risk that juries will use this inherent doubt as the foundation for unwarranted acquittals. See *Hopt* v. *Utah*,

120 U. S. 430, 439-440 (1887). By defining "substantial" as not "mere possibility, . . . bare imagination, or . . . fanciful conjecture" the Nebraska instruction advances the important goal of minimizing the risk of jury error.

The validity of Nebraska's instruction is further enhanced by the inclusion of the "graver and more important transactions of life" language. This type of instruction has been consistently approved as one of the best ways of defining reasonable doubt. See, *e.g.*, *id.*, at 441; *Holland* v. *United States*, 348 U. S. 121, 140 (1954). Taken as a whole, Nebraska more than adequately instructs its juries on reasonable doubt.

The use of "moral certainty" does not render either the California or the Nebraska instruction unconstitutional. This old and well-respected term was criticized in *Cage* because it was combined with the grossly improper uses of "grave" and "substantial." As California uses neither of these terms and Nebraska's use of "substantial" is proper within its context, "moral certainty" does not poison either instruction. It is a term "that has received frequent sanction and has been quoted innumerable times . . . ." 9 J. Wigmore, Evidence § 2497, at 405 (Chadbourn rev. 1981). The brief, partially overruled *Cage per curiam* should not be allowed to strike down this long-accepted instruction.

"Moral certainty" may not be this Court's ideal of a proper reasonable doubt instruction, but this Court does not review the wisdom of a state's practice. See *Johnson* v. *Louisiana*, 406 U. S. 356, 362 (1972). It is looking for that rarest of practices, a fundamentally unfair procedure. Unlike "grave doubt," moral certainty does not tell the jury to use a standard different from reasonable doubt. Instead, the *Webster* instruction used by California refers to simple "reasonable doubt" and requires the jury to have "an abiding conviction" of defendant's guilt. See Opp., at 5, n. 2.

Furthermore, the California instruction places moral certainty in a different context than the instruction in *Cage*. The California instruction states "[i]t is that state of the case which after the *entire comparison and consideration of all the evidence* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." *Ibid*. (emphasis added). The *Cage* Court was concerned that the instruction before it would keep the jury from basing its verdict on "evidentiary certainty." *Cage*, *supra*, 498 U. S., at 41. California's instruction, however, explicitly requires the jury to consider all the evidence before reaching its verdict.

The key to the *Cage* opinion is the "grave uncertainty" language. As Justice Stevens has noted, an instruction that does not contain the "grave uncertainty" language condemned by *Cage* does not raise the question of whether *Cage* was violated. See *Gaskins* v. *McKellar*, 114 L. Ed. 2d 728, 111 S. Ct. 2277 (1991) (Stevens, J., concurring in denial of certiorari). As neither of these instructions have that fatal flaw, *Cage* should not be invoked to void the long-respected practices embodied in the California and Nebraska instructions.

IV. This Court should not stifle experimentation in this difficult area.

A. Limited Alternatives.

Before this Court considers voiding the California and Nebraska instructions it should consider the problem of coming up with a constitutionally acceptable alternative. Several states use language that is the same or similar to that found in these two instructions, and many states rely on pattern instructions in order to insure an important consistency in the treatment of defendants. This means that disapproval of the instructions in question could leave

many convictions vulnerable, as a key instruction used in every prosecution is suddenly uprooted.

If this Court does not provide the states with guidance on what is an acceptable instruction, confusion is sure to follow. One need only look at the aftermath of *Furman* v. *Georgia*, 408 U. S. 238 (1972), where many states responded to the many *Furman* opinions by eliminating the sentencer's discretion in capital cases, only to have this approach rejected in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). The reasonable doubt instruction must be given in every criminal case. As failure to give a proper reasonable doubt instruction is never harmless error, see *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 190, 113 S. Ct. 2078, 2082 (1993), this matter is too important to be left undecided.

The problem, however, is that there is no clearly superior definition of reasonable doubt. The problem of defining reasonable doubt has been well-documented and widely lamented. See, *e.g.*, *Miles* v. *United States*, 103 U. S. 304, 312 (1881); *Dunbar* v. *United States*, 156 U. S. 185, 199 (1895); 9 J. Wigmore, Evidence § 2497, at 405 (Chadbourn rev. 1981). This Court should not use the Due Process Clause to try to solve this mystery.

The problem with defining reasonable doubt is that "[o]ut of the domain of the exact sciences and actual observation there is no absolute certainty." *Hopt* v. *Utah*, 120 U. S. 430, 439 (1887). Since trials are far from scientific, the reasonable doubt instruction must prevent the trivial doubt inevitable in human affairs from requiring an acquittal in every case, while at the same time preserving the presumption of innocence.

Perhaps the most popular alternative to the *Webster* definition is one of the many variants of the "important transactions" instruction found in Nebraska. See *State* v. *Morley*, 474 N. W. 2d 660, 669 (1991). This illustration is popular in the federal courts and has been well-received by this Court. See *Hopt*, *supra*, 120 U. S., at 441; *Miles*,

supra, 103 U. S., at 312; *Holland* v. *United States*, 348 U. S. 121, 140 (1954); *United States* v. *Ivic*, 700 F. 2d 51, 68 (CA2 1983).

There is nothing wrong with this type of instruction and any instruction that used this language would help the jury understand its duty. Yet it is not necessarily the best definition. Because it illustrates by way of analogy, it requires jurors to make an extra logical connection that they would not have to make if reasonable doubt were defined directly. While it may be better than any current definition, it is by no means the best possible one. There may be some undiscovered instruction that will even better illustrate the jury's duty to weigh the evidence.

The other popular posture is to leave reasonable doubt undefined. See, *e.g.*, *People* v. *Brigham*, 25 Cal. 3d 283, 314, 599 P. 2d 100, 120 (1979) (Mosk, J., concurring). This approach would upset the many instructions that try to define reasonable doubt. Furthermore, in complicated cases some definition of reasonable doubt may be necessary to guide the jury. See *Hopt* v. *Utah*, 120 U. S. 430, 440 (1887). Adopting a no-definition rule leaves juries in the dark and precludes trial courts from finding better alternatives.

It is unfair to expect perfection, even from this Court. After all, this Court is final, not infallible. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring). But when this Court invokes the Constitution to require a state to follow a particular standard, it should impose only the best possible standard.

If this Court says that as a matter of constitutional law the states must define reasonable doubt in a particular way, then the debate and experimentation over the proper reasonable doubt instruction will ossify, and this Court's standard will become the unanimous rule. This will stifle all innovation until this Court decides to return to the issue. Given the great pressures on this Court's resources, it is unlikely that it will soon return to the issue of

defining reasonable doubt. For example, for nearly seventy years the leading case on the key issue of admitting scientific testimony did not come from this Court, but from a federal circuit court, *Frye* v. *United States*, 293 F. 1013 (D. C. App. 1923). Only many years after changes in Rule 702 of the Federal Rules of Evidence did this Court weigh in with its own standard. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Thus, any standard announced in this case is likely to be the sole standard for a very long time.

Even if this Court allows the states to vary from whatever definition of reasonable doubt it announces, innovation is likely to stop. *Miranda* v. *Arizona*, 384 U. S. 436 (1966) shows how the inherent coercive power behind this Court's pronouncement can turn even the most voluntary standards into rigid rules.

When the *Miranda* Court announced the now famous warnings, it did not intend to end the dialogue on what warning would be proper. "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant." *Id.*, at 476 (emphasis added). Yet there has been no flowering of ideas on alternative warnings after *Miranda*.

While some agencies like the FBI do vary their warnings from *Miranda*, see *Duckworth* v. *Eagan*, 492 U. S. 195, 202, n. 4 (1989), for the most part, *Miranda* is the standard. This happens because any state that varies from the *Miranda* standard risks substantial litigation and the prospect of having many convictions reversed for *Miranda* violations. In *Eagan*, the *Miranda* warnings given by the police varied from the original by noting that "*We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*" *Id.*,

at 198 (emphasis in original). The *Eagan* Court vindicated this minor variance, but it did so on a narrow five-to-four majority, and had to overturn a decision by the Seventh Circuit granting habeas corpus. See *id.*, at 200-201. If such a small deviation from the norm requires that much effort to defend, there is no question why *Miranda* has stopped most innovation.

Reasonable doubt is even more important than the *Miranda* warnings. A reasonable doubt instruction must be given in every criminal trial, see *In re Winship*, 397 U. S. 358, 364 (1970), and failure to give an adequate instruction is never harmless error. See *Sullivan* v. *Louisiana*, 124 L. Ed. 2d 182, 190, 113 S. Ct. 2078, 2082 (1993). Thus, any standard announced in the present case would have to be followed even more closely than the one in *Miranda*.

That would be a real tragedy. The states are the laboratories of the law. They must be given the freedom to experiment so that we can all profit by picking from the best of the diverse approaches adopted by the fifty states. "The science of government . . . . is the science of experiment." *Anderson* v. *Dunn*, 6 Wheat. (19 U. S.) 204, 226 (1821), overruled on other grounds in *Kilbourn* v. *Thompson*, 103 U. S. 168, 199-200 (1881).

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable

> to matters of substantive laws as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted); accord *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 546 (1985).

B. The Slippery Slope.

Petitioners' desire to invoke the Due Process Clause to interfere with these two traditionally accepted instructions places this Court at the precipice of a particularly slippery slope. If this Court heeds their wishes, it will come much closer to creating a constitutional code of evidence. That result is a calamity that must be resisted.

There are times when this Court should strike down a reasonable doubt instruction. When one is as egregiously bad as the instruction in *Cage* v. *Louisiana*, 498 U. S. 39 (1990), then reversal is deserved. But the instructions in the present case are of a different type. Whatever their minor imperfections, they do not contain the gross inaccuracies found in the instruction condemned in *Cage*. See Part III, *ante*, at 18-22. A decision condemning the California and Nebraska decisions thus comes much closer to an intrusion into the law of evidence.

This Court's experience with other constitutional evidence issues should keep it from expanding this field. One of the best examples of the problems associated with constitutionalizing evidentiary issues is the current tangled state of death penalty law. What started with a generalized disapproval of the unfettered jury discretion in *Furman* v. *Georgia*, 408 U. S. 238 (1972) has evolved into one of the most complicated areas of American law. Responding to the various circumstances of capital

litigation, this Court now simultaneously requires the states to limit the sentencer's discretion, see *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (plurality), while at the same time giving the sentencer the discretion and information necessary to make an individualized determination of the appropriate sentence for each capital defendant. See *Woodson* v. *North Carolina*, 428 U. S. 280, 303-305 (1976) (plurality); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality). At the very least there is "inherent tension between" these two lines, see *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (Blackmun, J., dissenting), while others would be even less charitably disposed towards the dissonance. See *Walton* v. *Arizona*, 497 U. S. 639, 664 (1990) (Scalia, J., concurring). In any event, they are a fertile source of complexity and unending litigation.

The Eighth Amendment is now drenched in evidentiary issues such as requiring the admission of certain types of evidence, see, *e.g.*, *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), and the instructions given juries, see, *e.g.*, *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985); *Mills* v. *Maryland*, 486 U. S. 367 (1988). While these inquiries may be necessary, there is no doubt that they are very complicated and take up enormous judicial resources.

This Court's experience with *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is similar. *Miranda* should have limited the complexity of the law of confessions. It forbids courts from using the facts of a particular case beyond determining whether the *Miranda* guidelines were followed. *Id.*, at 468-469. Instead, the *Miranda* Court supplied a set of guidelines for the courts and police to follow. *Id.*, at 441-442.

This did not eliminate litigation. *Miranda* has been a steady source of cases for this Court over the years, and the supply has not yet abated. See, *e.g.*, *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Arizona* v. *Roberson*, 486 U. S. 675 (1988); *Minnick* v. *Mississippi*, 112 L. Ed. 2d 489, 111 S. Ct. 486 (1990); *Stansbury* v. *California*, No. 93-5770 (cert. granted Nov. 1, 1993). Considerable problems have arisen over such issues as the difference between interrogation and spontaneous declaration, adequacy of the waiver, and the adequacy of the warning. See *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 432, 113 S. Ct. 1745, 1763 (1993) (O'Connor, J., dissenting).

Miranda involves just one part of the law of evidence, the privilege against self-incrimination. While the decision itself may be worthwhile, it has come at a high cost of complexity and continued litigation.

The law of evidence is inherently complex. Because it is very fact-intensive and involves an extraordinarily large set of legal principles, evidentiary issues always carry with them the threat of complexity. Thus, while it took Professor LaFave only four volumes to complete his masterwork on search and seizure, see LaFave, Search and Seizure (2d ed. 1987), it took Dean Wigmore nine larger volumes to explain the law of evidence. See Wigmore, Evidence (3d ed. 1940). While not precise, this is a good measure of how dangerous constitutionalizing the law of evidence can be.

Therefore, it comes as no surprise that this Court has taken great pains to avoid using the confrontation clause to constitutionalize the rule against hearsay. See *Dutton* v. *Evans*, 400 U. S. 74, 80 (1970). Instead it has sought to protect the narrower principles of confrontation by focusing on protecting defendant's right to "full and effective cross-examination." *California* v. *Green*, 399 U. S. 149, 158 (1970). This is much less complex and disruptive than "a reappraisal of every exception to the hearsay rule, no matter how long established . . . ." *Dutton*, *supra*, 400 U. S., at 80.

Such deference is even more important in the present case. The death penalty, *Miranda*, and the confrontation clause involved specific protections grounded in the Bill of Rights. The present case involves the much more subjective claim of general unfairness. This Court has

been unwilling to aggressively extend this ephemeral portion of the Due Process Clause and should continue to do so here. See *Spencer* v. *Texas*, 385 U. S. 554, 565 (1967).

CONCLUSION

The decisions of the California Supreme Court and the Nebraska Supreme Court should be affirmed.

December, 1993

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

APPENDIX

California Jury Instructions—Criminal ("CALJIC") No. 2.90 (5th ed. 1988):

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

State v. *Morley*, 474 N. W. 2d 660, 669-670 (Neb. 1991):

> " 'Reasonable doubt' is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt

> that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture."

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No. 92-9049

92-8994

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALFRED ARTHUR SANDOVAL,

PETITIONER,

v.

STATE OF CALIFORNIA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE*, CALIFORNIA DISTRICT ATTORNEYS' ASSOCIATION, IN SUPPORT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED

Was petitioner deprived of due process and a fair jury trial by the use of a constitutionally defective reasonable doubt instruction which invited the jury to base its verdict on improper "moral" considerations rather than on an evidentiary evaluation?

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No. 92-9049

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

ALFRED ARTHUR SANDOVAL,

PETITIONER,

v.

STATE OF CALIFORNIA,

RESPONDENT.

MOTION FOR LEAVE TO FILE
BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
THE STATE OF CALIFORNIA

Pursuant to Rule 37.4, Rules of the Supreme Court of the United States, ***amicus curiae***, the Appellate Committee of the California District Attorneys' Association, including the District Attorney of Los Angeles County, hereby moves for leave of this Court to file the attached ***amicus curiae*** brief in support of the State of California.

Pursuant to Rule 37.3, Rules of the Supreme Court of the United States, ***amicus*** sought consent from petitioner in this case. Petitioner's counsel agreed by telephone to the Committee's request to file an ***amicus*** brief in support of respondent in the instant case, and counsel for the Committee sent a consent form to counsel for petitioner, together with a self-addressed, stamped envelope. Counsel for petitioner has failed to return the consent form and, as of the date and time this brief was submitted for printing, had not responded to repeated telephone calls from counsel for the Committee.

The California District Attorneys' Association is an association of District Attorneys who are authorized law officers of the State of California and of the counties they represent, including the County of Los Angeles, such counties being political subdivisions of the state. Thus, had the members of this association individually and separately sought to file this brief, consent would not have been required. *See*, Rule 37.5, Rules of the Supreme Court of the United States.

In the event that this Court is not inclined to grant leave to file this brief on behalf of the Association, *amicus* respectfully requests that it be filed on behalf of the District Attorney of Los Angeles County alone under Rule 37.5.

Amicus believes that, pursuant to Rule 37.1, Rules of the Supreme Court of the United States, the *amicus* brief offered herein brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties, and will be of considerable help to the Court. It addresses the use of the term "moral" in the context of the California "reasonable doubt" jury instruction, considers how the phrases used have been interpreted by other states and reference authorities, and examines the role that these phrases play when considered in light of the entire charge to the jury.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys' Association is a committee created by an association consisting of the District Attorneys of the State of California and their deputies. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State of California, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. One member of the Association is the District Attorney of Los Angeles County. Upon review of the instant matter, the Committee, including a representative of the District Attorney of Los Angeles County, has concluded that the outcome of this case

may have profound impact upon the administration of criminal justice throughout California because it places in jeopardy every criminal conviction in the state not yet final. California's already-vastly overburdened criminal justice system tries more than 12,000 jury trials in a given year. 2 Judicial Council of California, *1993 Annual Report* p.56 (felonies), p.78 (misdemeanors) (1993). This figure includes more than 5,000 felony trials. *Id.*, at 56. Pursuant to this Court's rulings in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and *Sullivan v. Louisiana* __ U.S. __, 113 S.Ct. 2078 (1993), *all* of these cases not yet final on appeal may be subject to per se reversal. This would include not only all recent criminal judgments following a jury trial, but all criminal cases pending on appeal in the six districts of the California Courts of Appeal. It would also include all pending criminal appeals before the Supreme Court, among them roughly 200 death-penalty appeals currently pending before that court. Gerald F. Uelman, *How the Justices Stack Up*, Daily Journal Report, June 4, 1993 at p.10. Many, if not most of these are from 5 to 10 years old, raising serious doubt as to the practicability of retrying those cases. In addition, as is discussed at length below, the Committee is convinced that California's standard jury instruction regarding reasonable doubt is Constitutionally sound. It is for these reasons that the Com-

mittee seeks leave to file the attached *amicus curiae* brief herein.

Respectfully submitted
on behalf of the

California District Attorneys
Association, and the District Attorney
of Los Angeles County

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SUMMARY OF ARGUMENT

Jury instructions should be read as a whole. Jurors do not parse every phrase of an instruction in the manner that lawyers might. The relevant standard for review of an allegedly ambiguous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, __ U.S. __, 110 S.Ct. 1190, 1198 (1990). Read in the context of the instruction at issue, the terms "moral evidence" and "moral certainty" are unlikely to confuse or mislead a jury.

Even read in isolation, the uses of the word "moral" in CALJIC instruction 2.90 are unlikely to mislead. "Moral evidence" merely focusses the jury's attention on the fact that the evidence in a criminal trial is, for the most part, human evidence, involving such issues as credibility, etc., rather than the sort of evidence which is absolutely determinable. The use of "moral certainty" emphasizes to the jury that, while absolute certainty is not required, in order to return a guilty verdict the jury must come to a subjective state of "near certitude."

The entire charge to the jury is to be read as a whole. A review of the instructions read in the instant case shows that, while the terms "moral evidence" and "moral certainty" are used but once and in passing, the phrase "beyond a reasonable doubt" is used repeatedly in California's pattern jury instructions as the touchstone for the determination of guilt.

INTRODUCTION

This Court has determined the fundamental Constitutional standard of proof applicable in criminal trials to be proof "beyond a reasonable doubt." *In re Winship*, 397 U.S. 362 (1970). In that case, the Court begins its analysis by tracing the use of the phrase, "beyond a reasonable doubt," from the late eighteenth century to the present. *Id.*, 397 U.S. at 361-63. The Court went on to conclude that, in light of the great interest of defendants in not being wrongfully found guilty, the "beyond a reasonable doubt" standard was required by the Due Process clause as "a prime instrument for reducing the risk of convictions resting on factual error." *Id.*, 397 U.S. at 363-64.

Almost a decade later, in *Jackson v. Virginia*, 443 U.S. 307 (1979), this Court described "beyond a reasonable doubt" as the applicable standard of proof because it "impress[es] upon the factfinder the need to reach a subjective state of *near certitude* of the guilt of the accused." *Id.*, at 315. This characterization of the Constitutional standard was anticipated fifteen years earlier by the California Supreme Court in *People* v. *Hall*, 396 P.2d 700 (Cal. 1964). *Id.*, at 705 ("To justify a criminal conviction, the trier of fact must be reasonably persuaded to a *near certainty*.") (Traynor, C.J., for the court). As addressed below, the California pattern jury instruction regarding "reasonable doubt" (hereinafter "CALJIC 2.90") does not reduce or dilute the standard of proof of guilt, which both this Court and the courts of California have found Constitutionally mandated.

I

CONSIDERED AS A WHOLE, IT IS UNLIKELY THAT CALJIC INSTRUCTION 2.90 WOULD MISLEAD A JURY

The fundamentally false premise underlying petitioner's basic argument is that jurors minutely analyze every word of the instructions given to them, such as a constitutional scholar might do. It is settled that "jury instructions are to be judged as a whole, rather than by picking isolated phrases from them."

Hamling v. United States, 418 U.S. 87, 107-08 (1974); *and see*, *Cage v. Louisiana*, __ U.S. __, 111 S.Ct. 328, 329 (1990). Furthermore, this Court has recently determined that the standard for interpreting an ambiguous instruction is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, __ U.S. __, 110 S.Ct. 1190, 1198 (1990); *accord*, *Estelle v. McGuire* __ U.S. __, 112 S.Ct. 475, 482 fn.4 (1991) [disapproving the standard applied in *Cage*, *supra*].[1]

This Court explained its reasoning for laying down the rule in *Boyde*, *supra*, in part as follows:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with common sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id., at 110 S.Ct. 1198.

Furthermore, the contexts in which the phrases "moral evidence" and "moral certainty" are used in CALJIC instruction 2.90 are not such that these phrases would likely lead jurors astray. First, as to the phrase "moral evidence," it is used in parallel with "human affairs" in CALJIC instruction 2.90: "It [reasonable doubt] is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt." The effect of these two phrases – "human affairs" and "moral evidence" – used together is to emphasize that, as the trier of

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1. In *Sullivan v. Louisiana*, __ U.S. __, 113 S.Ct. 2078 (1993), this Court declined to apply the standard enunciated in *Boyde* and *Estelle* on the grounds that the state had "fail[ed] to raise this issue below." *Id.*, 113 S.Ct. at 2081 fn.1. By contrast, as soon as petitioner, with his case pending before the California Supreme Court, raised the issue of the alleged unconstitutionality of the "reasonable doubt" instruction in a supplemental brief, the State of California responded by expressly raising the *Boyde/Estelle* issue. Respondent's Reply to Appellant's Supplemental Brief to the California Supreme Court, p.4.

fact, the jury will not be concerned primarily with matters – e.g., scientific or philosophical – that can be definitively resolved by experiment or measurement, or which inhabit the realm of pure reason. Rather, the jury will be concerned with the much more problematic world of human evidence, where few truths are ascertainable with absolute certainty. In its deliberations, the jury will, for example, be called upon to judge the credibility of witnesses, often relying (at least in part) upon subtle clues such as demeanor or attitude. See CALJIC 2.20 (regarding credibility of witnesses). In so doing, the jury must be alert to the possibility that a witness may intentionally not tell the truth, but they must also allow for human frailties, such as forgetfulness or innocent misrecollection. See CALJIC 2.21.1 (making this point). In sum, the parallel usage of the terms "human affairs" and "moral evidence" serves to put the jurors on notice as to the nature of the evidence they will be evaluating in their deliberations and to emphasize that absolute certainty is not to be expected in such matters. Therefore, it is unlikely that a jury would be misled by the one-time use of the phrase "moral evidence," when considered in context.

Second, as to the use of "moral certainty" in CALJIC 2.90, this term is used in conjunction with the phrase "abiding conviction." Far from lowering the standard of proof, as petitioner alleges, the sentence in which these two phrases are used serves as a counterpoint to the immediately preceding sentence, addressing "possible or imaginary doubt." That is, although the jurors cannot expect absolute certainty, neither may they return a guilty verdict if they harbor serious subjective doubt; rather, they must come to an "*abiding conviction* to a moral *certainty*." As such, the two phrases used together embody that standard of a "need to reach a state of near certitude," or "near certainty," of guilt, which both this Court and the California Supreme Court have adopted as a measure of the standard of proof required by the Due Process clause. *In re Winship*, *supra*, 397 U.S. at 364; *People* v. *Hall*, *supra*, 396 P.2d at 705.

Third, California has not sat by idly or uncritically with regard to the present "reasonable doubt" instruction. On the contrary, as recently as 1987, the state legislature requested the committee responsible for California's pattern jury instructions (hereinafter, the "CALJIC Committee") to undertake a thorough reexamination of the present instruction and of "alternatives" to

it.[2] The CALJIC Committee undertook this reexamination of the instruction from several different perspectives. It noted the lack of empirical evidence that the instruction was confusing or ambiguous for jurors. CALJIC Report on Reasonable Doubt, 14-15 (bracket added). It also surveyed judges and lawyers in California who actually observed CALJIC 2.90 in use. It found "a substantial consensus among judges and lawyers . . . that there [should] be no change in the definition of reasonable doubt." *Id.*, at 44 (bracket added). The committee then surveyed jury instructions on reasonable doubt in all of the fifty states. *Id.*, at 15-34.[3] Based upon this careful review of the advantages and disadvantages of changing California's "reasonable doubt" instruction, the committee concluded that the present instruction should be retained. *Id.*, at 7-10.

II

EVEN CONSIDERED IN ISOLATION, THE USE OF THE WORD "MORAL" IN CALJIC INSTRUCTION 2.90 DOES NOT DILUTE THE DUE PROCESS RIGHT STANDARD OF PROOF "BEYOND A REASONABLE DOUBT"

The most recent, authoritative reference dictionary of the English language, published just this year, defines "moral certainty" to mean "a degree of probability so great as to admit of *no reasonable doubt*; *a practical certainty*." *The New Shorter*

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2. Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles, Report of the Committee on Standard Jury Instructions -- Criminal of the Los Angeles Superior Court to the California Legislature on Alternatives to the Reasonable Doubt Definition (1987), *reprinted at* Daily Journal, May 22, 1987 – No. 87-10, hereinafter, "CALJIC Report on Reasonable Doubt Instruction." The study was undertaken by the Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles County (commonly referred to as the "CALJIC Committee"), which is a committee of judges and attorneys responsible for California's pattern jury instructions in criminal law. Committee on Standard Jury Instructions, Criminal of the Superior Court of Los Angeles, *California Jury Instructions, Criminal* ["CALJIC"] (5th ed. 1988).

3. For example, the Committee's study reflected that, as of 1987, a dozen states used the phrase, "moral certainty." *Ibid.*

Oxford English Dictionary 1827 (Oxford, 1993). Similarly, *Black's Law Dictionary* defines "moral certainty" to mean:

> That degree of assurance which induces a man of sound mind to act, without doubt, upon the conclusions to which it leads. A high degree of impression of the truth of a fact, falling short of absolute certainty, but sufficient to justify a verdict of guilty, even in a capital case. Such signifies a probability sufficiently strong to justify action on it; a very high degree of probability, although not demonstrable, as a certainty. It has also been used as indicating a conclusion of the mind established *beyond a reasonable doubt*.

Id., 909 (5th ed. 1979).

And the *Oxford English Dictionary*, the most authoritative dictionary in the history of the English Language, defines the phrase in very similar language, as "a practical certainty resulting from moral evidence; a degree of probability so great as to admit of *no reasonable doubt*." *The Oxford English Dictionary*, "M,"654 (Compact Edition, 1971).

Many courts have expressly found the terms "moral certainty" and "moral evidence" to be synonymous. *Rhinehart v. State*, 299 S.W. 755, 757 (Ark. 1927); *State v. Desrosiers*, 559 A.2d 641, 645 (R.I. 1989); *Erving v. State*, 427 So.2d 701, 704-05 (Miss. 1983); *State v. Reid*, 267 P.2d 986, 990 (Mont. 1954); *State v. Payne*, 289 N.W.2d 173, 179 (Neb. 1980); *People* v. *Rossman* 463 N.Y.S.2d 891, 893 (N.Y.App.Div. 1983); *State v. Watson*, 240 S.E.2d 440, 446 (N.C. 1978); *Moore v. State*, 318 S.E.2d 172, 173 (Ga.App. 1984); *Commonwealth v. Rankin*, 311 A.2d 660, 661 fn.1 (Pa.Super. 1973); *State v. Ramey*, 60 S.E.2d 66, 72 (S.C. 1950).

Thus, the phrase, "moral certainty" in no way "dilutes" the burden of the state to prove a charge beyond a reasonable doubt. On the contrary, it serves to impress upon the jury the need for "near certitude" in their belief of a defendant's guilt before returning a guilty verdict. *Jackson v. Virginia*, 443 U.S., *supra*, at 315. In fact, some courts have expressed the view that "moral certainty" elevates the burden on the prosecution above "beyond a reasonable doubt." *United States v. Tobin*, 576 F.2d 687, 694 (5th Cir. 1978); *United States v. Smaldone*, 485 F.2d 1333, 1348 (10th Cir. 1973); *and see, Monk v. Zelez*, 901 F.2d 885, 890 (10th Cir. 1990). Indeed, many defendants have

appealed their cases, arguing that an instruction prescribing the "beyond a reasonable doubt" standard was not enough – that they had a *right* to have the jury instructed that they must find a defendant guilty to a "moral certainty." *E.g.*, *State v. Butler*, 543 A.2d 270, 278 (Conn. 1988); *Bruce v. State*, 616 A.2d 392, 403 (Md. 1992); *Evans v. State* 499 A.2d 1261, 1287 (Md. 1985); *People v. Sammons* 478 N.W.2d 901, 912 (Mich.App. 1991); *State v. Galvan*, 368 N.W.2d 400, 402-03 (Minn.App. 1985); *State v. Udstuen*, 345 N.W.2d 766, 768 (Minn. 1984); *Smith v. State*, 394 So.2d 882, 884-85 (Miss. 1981); *State v. Oliver*, 354 S.E.2d 527, 541 (N.C.App. 1987); *Crocker v. State*, 573 S.W.2d 190, 207 (Tex.Crim.App. 1978).

On the other hand, the phrase "moral certainty" serves to emphasize that we are dealing here in the realm of human affairs, not in a realm of abstractions. Other states emphasize this distinction in different terms. Some courts explain to the jury in the course of their "reasonable doubt" instruction that returning a guilty verdict does not require a "mathematical certainty" because in practical matters such as crime there is no such certainty. *See*, David M Bordon and Leonard Orland, *Criminal Jury Instructions*, in 5 *Connecticut Practice* §2.9 at 50-51 (1986 and Supp. 1993[4]); *Criminal Jury Instruction, District of Columbia* §2.09 (3rd ed. 1978) (*and see, Foreman v. United States*, 1993 WL 477614 at fn.2); Council of Superior Court Judges of Georgia, *Suggested Pattern Jury Instructions*, Part 2.D. (2d. ed. 1991); *Maryland Criminal Pattern Jury Instructions* 2:02 (1991); *and see, Holland v. United States*, 348 U.S. 121, 138-39 (1954). Other states emphasize that what is called for is not "absolute" certainty or freedom from "all" doubt. *See*, *Criminal Jury Instructions (Connecticut)*, *supra*, at §2.9; *Georgia Suggested Pattern Jury Instruction*, *supra*, at Part 2.D.; *Hawaii Standard Jury Instruction* No. 3.02; *South Dakota Pattern Jury Instructions, Criminal*, No. 1-6-1; *Tennessee Pattern Jury Instructions - Criminal* §2.03 (3d.ed. 1992); *see also, People v. Johnson*, 842 P.2d 1, 46 fn.1 (Cal. 1992); *Wintjen v. State* 398 A.2d 780, 781 (Del. 1979); *Dominick v. State*, 433 S.E.2d 405 (Ga.App. 1993).

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4. Petitioner incorrectly states that Connecticut has no pattern jury instructions. Petitioner's Brief on the Merits, p.A-2.

Similarly, "moral evidence" imports evidence of a practical, rather than mathematical or absolute nature. *Black's Law Dictionary* defines that phrase,

> [a]s opposed to "mathematical" or "demonstrative" evidence, this term denotes that kind of evidence which, without developing an absolute and necessary certainty, generates a high degree of probability or persuasive force. It is founded upon analogy or induction, experience of the ordinary course of nature or the sequence of events, and the testimony of men.

Id., at 909.

In sum, the employment of these terms, "moral certainty" and "moral evidence," even considered in isolation from the rest of the instruction, is unlikely to mislead a jury from its duty to apply the "beyond a reasonable doubt" standard of proof.

III

IF THE CHARGE TO THE JURY IS CONSIDERED AS A WHOLE, IT IS CLEAR THAT NO REASONABLE JURY WOULD LIKELY BE MISLED

It is the settled jurisprudence of this Court that the charge to the jury must be read as a whole. As the Court stated in *United States v. Park*, 421 U.S. 658 (1975), "`a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Id.*, at 674, quoting from *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).[5] Reading the jury instructions in the instant case as a whole demonstrates that the jurors would not likely have been led astray by the passing use of the "moral evidence" and "moral certainty" in instruction 2.90.

Petitioner argues that "the term `moral certainty' . . . invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence." Petitioner's Brief on the Merits, at 25; *and see* pp.25-32 (*passim*). With regard to "moral evidence," petitioner claims that the term "connotes matters

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5. In fact, California's standard, pattern jury instructions expressly instruct jurors that they *must* consider the instructions as a whole. (CALJIC 1.01.)

relating to the ethics or morality of a particular situation, rather than the objective, verifiable facts comprising the situation." *Id.*, at 32-34. But when the "reasonable doubt" instruction is read in the context of the other instructions, it is clear that neither of these claims is justified.

The very first jury instruction generally given in criminal cases in California is CALJIC 1.00, the complete text of which is set out in the margin.[6] This pattern instruction is given in virtually all criminal jury trials, and was given in petitioner's case. Joint Appendix, at 51-52. *By its terms*, it instructs jurors that they "must not be influenced . . . by prejudice against" the defendant, and that they "must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." CALJIC 1.00. Thus, even assuming *arguendo* that "moral certainty" invites jurors to consider their "feelings" and "emotions," as petitioner contends, they have

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6. You have heard all the evidence [and the arguments of the attorneys], and now it is my duty to instruct you on the law that applies to this case.

[The law requires that I read the instructions to you.] [You will have these instructions in written form in the jury room to refer to during your deliberations.]

You must base your decision on the facts and the law.

You have two duties to perform. First, you must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence [or by stipulation. A stipulation is an agreement between attorneys regarding the facts]. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict [and any finding you are instructed to include in your verdict].

You must accept and follow the law as I state it to you, whether or not you agree with the law. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

You must not be influenced by pity for a defendant or by prejudice against [him] [her]. You must not be biased against the defendant because [he] [she] has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that [he] [she] is more likely to be guilty than innocent. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences.

already been expressly instructed that that is one thing they "must not" do. Again, with regard to the assertion that "moral evidence" invites a jury to consider improper ethical considerations, Instruction 1.00 expressly directs the jurors that they

> must determine the facts from the evidence received in the trial and not from any other source. A "fact" is something proved directly or circumstantially by the evidence. Second, you must apply the law that I state to you, to the facts, as you determine them, and in this way arrive at your verdict.

CALJIC 1.00.

CALJIC instruction 2.00 goes on to define evidence and to distinguish between direct and circumstantial evidence. Many other instructions explain or direct the jury as to how to consider particular types of evidence and what factors are relevant to weighing that evidence. For example, at petitioner's trial, the jury was instructed that statements and questions by lawyers are not evidence. Joint Appendix, at 54 (CALJIC 1.02). They were instructed as to what specific factors may be used to evaluate the credibility of witnesses. Joint Appendix, at 60-61 (CALJIC 2.20). They were told that certain evidence was admitted for a limited purpose and could not be considered for any other purpose. Joint Appendix, at 58 (CALJIC 2.09). They were told how to weigh the testimony of expert witnesses. Joint Appendix, at 75 (CALJIC 2.80). The fact is that the practices and procedures which a jury must use in evaluating the evidence adduced at trial are carefully controlled and limited to evidence relevant to the determination of the defendant's guilt or innocence. Thus, there is no reasonable likelihood that one passing reference to "moral evidence" would mislead a jury from their duty.

Finally, it is fundamental to petitioner's claim that the due process requirement that the prosecution prove its case "beyond a reasonable doubt" has been reduced or diluted. But, reading the instructions as a whole shows that this is not so. "Moral evidence" and "moral certainty" are used but once, in CALJIC 2.90. The phrase, "beyond a reasonable doubt," by contrast, is used repeatedly in California's standard instructions as the touchstone for proof of guilt. Thus, the standard instruction regarding the defendant's right not to testify reads:

> In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove ***beyond a reasonable doubt*** every essential element of the charge against him. No lack of testimony on defendant's part will make up for a failure of proof by the People so as to support a finding against [him] [her] on any such essential element.

CALJIC 2.61.

The standard instruction regarding eye-witness identification reads:

> The burden is on the People to prove ***beyond a reasonable doubt*** that the defendant is the person who committed the crime with which [he] [she] is charged.
>
> *If*, after considering the circumstances of the identification . . . ***you have a reasonable doubt*** whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find [him] [her] not guilty.

CALJIC 2.91.

Again, the instruction distinguishing murder (the crime charged in the instant case) from manslaughter includes the following language: "To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove ***beyond a reasonable doubt*** each of the elements of murder . . . ." CALJIC 8.50.

Each of these instructions was given at petitioner's trial. Joint Appendix, at 72, 79 and 95. The jury was also instructed that, if they have "a reasonable doubt" as to whether the crime is first or second degree murder, they must return a verdict in the second degree. Joint Appendix, at 97 (CALJIC 8.71). They were given a similar instruction with regard to the distinction between murder and manslaughter. Joint Appendix, at 98 (CALJIC 8.72). In fact, the jurors were told, expressly, that the standard of proof was "beyond a reasonable doubt," at least six times in six different instructions. *See also*, Joint Appendix, at 118 (CALJIC 8.72 and CALJIC 8.80 and 8.81.3 as modified by the trial court). And this does not count how many other times they were given the corresponding phrase (in one form or another) that "if you [the jury] have a reasonable doubt" you must find the defendant not guilty, or guilty of the lesser crime,

etc. Under these circumstances, or anything like them, no juror would be confused as to what the applicable standard of proof was – that is, *beyond a reasonable doubt*.

CONCLUSION

For the reasons stated above, and in view of the potentially serious consequences for the criminal justice systems of California and of several of its sister states, amicus urges this Court to affirm the ruling of the California Supreme Court.

Respectfully submitted
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